90-1217

(3)

FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

APPENDIX B
APPEALS COURT

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FILED SEPTEMBER 17, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING, Appellant	)	
v.	)	No. 90-5062
	)	C. A. No. 89-02837
S. MARTIN TEEL, JR., U. S.Bankruptcy Court, et al. Appellees	)	

PETITION FOR REHEARING
AND
SUGGESTION FOR EN BANC CONSIDERATION

This appeal emanates from Appellant's allegations of illegal arrest and incarceration pursuant to a contempt order of the bankruptcy court for the District of Columbia. The bankruptcy court (Teel, J.) found Appellant in contempt of court after ordering her to comply with an appointed, but as of yet unqualified, trustee's motion to compel her cooperation. She refused not only to recognize the legality of that so-called trustee (thus his standing in the

bankruptcy court), but she also refused to cooperate with him in her joint bankruptcy proceeding. [An appeal as to the legality of this so-called trustee is pending before this Court]. Utilizing Rule 9020 of the Rules of Bankruptcy Procedure, the bankruptcy court instructed Appellant to surrender herself to the United States Marshall or face arrest. The bankruptcy court extended Appellant's time to file objections to this contempt order to October 24, 1988; however, on October 14, 1988, at 3:15 p.m. the United States Marshals arrested Appellant.

Appellant filed a complaint for damages (illegal arrest) against the bankruptcy judge and his clerk, the United States Trustee and his assistant, the so-called trustee, his attorney and his attorney's law firm with jurisdiction pursuant to the

United States Constitution, Amendment V, and 42 U. S. C. 1983. An amended complaint later added the United States Marshal and three of his deputies.

Appellant's amended complaint alleges that all Appellees

> ..."under color of law" ... through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating plaintiff's guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of the above-named plaintiff in blatant and malicious use of process in direct violation of the Constitution of the United States."

The District Court held that the Appellant's amended complaint failed to state a claim upon which relief may be granted pursuant to 12(b)(6) of the Federal Rules of Civil Procedure. The court also held that the plaintiff had failed to state a constitutional tort claim. Mem. Op., at 3. Specifically, the court concluded that

no claim existed under 42 U. S. C. 1983 because the amended complaint failed to allege any action by any person under color of state law. The District Court also found the amended complaint failed to state a Bivens claim against any of the federal appellees or against the non-federal defendants. The court held that the so-called trustee took actions as trustee [a presumption that a legitimately appointed and qualified trustee was in place], a party to litigation that led to the contempt order against the plaintiff; therefore, "[t]his was not conduct under color of law and thus not a due process violation." And, the court continued on in a footnote:

> A suit against a bankruptcy trustee for quasi-judicial actions, as opposed to actions undertaken as a party to litigation, would be subject to dismissal on immunity grounds. See Mullis v. U. S. Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir.

1987).

The district court dismissed the claim against the United States Trustee and his assistant for failure to meet the "heightened pleading" standard for a Bivens action. Id., at 5. Moreover, the court held that the bankruptcy judge was entitled to absolute immunity under Bradley v. Fisher, 80 U. S. 335 (1871) and Stump v. Sparkman, 435 U. S. 349 (1978) since he was empowered to hold Appellant in contempt [whether it be civil or criminal or both has never been determined by anyone] under Bankruptcy Rule 9020 and therefore did not act in the clear absence of all jurisdiction. Id. The clerk of the bankruptcy court and the marshals were also held to have judicial immunity since their actions were closely associated with the judicial process. Nothwithstanding that, the marshals were entitled to at least

qualified immunity under Harlow v. Fitzgerald, 457 U. S. 800 (1982). Id., at 5-6.

The court continued that case law makes clear that the action must be dismissed "[i]f a plaintiff fails to allege direct evidence of unconstitutional intent and "... such intent must be pleaded with specific, discernible facts or offers of proof that constitutes direct as opposed to merely circumstantial evidence of intent." This reflects the district court's opinion in decisions of Whitacre v. Davey, 890 F.2d 1168, 1171 n. 4 (D.C. Cir. 1989) and Seigart v. Gilley, slip. op. at 9 (D.C. Cir. February 9, 1990) [Now cited as Seigart vs. Gilley, 895 F.2d 797 (D.C. Cir. 1990)].

Based on these findings, the District Court

dismissed this case with prejudice. This appeal followed.

Concise Statement of Issue and Its Importance

It is a sad day, indeed, in the annals of American jurisprudence when a court of appeals -- especially this Court of Appeals -- grants, with temerity, summary affirmance of a district court order denying the full protections afforded Appellant by the Constitution of the United States whilst knowing "... how deficient [this Court's] procedures are in granting motions for summary affirmance ...." United States v. Glover, 731 F.2d 41, 48 et seq. (1984).

No doubt, this appeal was first referred to a three-judge motions panel -- only two of whom physically meet, in camera, to review

motions once a week and where as many as ten or fifteen motions are decided in one or two hours. If the two attending judges have divergent opinions the papers are presented to the third "tie-breaker" judge.

It is an insult to this Appellant -- a law-abiding and taxpaying citizen -- that this Court, in making short shrift of this appeal with such cursory treatment, totally ignored a meritorious complaint and released an order such as this:

> The issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit. It is not necessary to resolve that issue here for appellant otherwise failed to state a claim against the appellees. The merits of the parties' positions are so clear as to justify summary action.

Nothing of the sort is "so clear."

> On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in light most favorable to the party opposing the motion. Walker v.

Washington, 627 F.2d 541 (1980) cert. denied 449 US 994.

Just what does this Court think the Appellant is doing up in this Court anyway? Is it not that she was arrested and incarcerated upon actions initiated by a legally questionable individual, who, operating under the guise of being a duly appointed and legally qualified trustee convinced an Article I bankruptcy judge who knew (since, inter alia, the Appellant in open court, beforehand, advised him of such) that he did not have the power to arrest or incarcerate anyone for any reason yet did otherwise? See In Re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985) which happens to be the controlling case law on this bankruptcy judge for this Circuit.

The per curiam opinion of this Court "cannot erase the fact that major aspects

of the normal appellate process are absent from this appeal." See United States v. Glover, 731 F.2d 41 (1984). For example:

(1) There was no oral argument. Id.;

(2) There is indication that this Court, once again, intends avoidance of either confirming or denying a lower court decision affirming Appellant's contention that all contempt powers of an Article I bankruptcy judge for the District of Columbia are nil and without those powers Appellant was, indeed, denied her "due process" rights ;

(3) There was no tradional collegiality of the decisional process normal to a multi-member appellate court. Id.;

(4) This appeal has not received the full attention of the court -- the attention it should have received ab initio; most significantly, once the motion for summary affirmance has been granted, the case has been decided on its merits. Id.

However, Appellant has clearly raised a viable claim for relief and that dismissal and summary affirmance was not, and is not, warranted. Since this Court "is a public business," Appellant believes her appeal

goes to the essence of the appellate process and requires a "public airing."

To begin with, Harlow v. Fitzgerald, 457 U. S. 800, 818, as a first step in considering a defendant's liability, instructed the trial judge to determine "whether [currently applicable] law was clearly established at the time an action occurred. This was never done. The District Court was correct in that it must not dismiss the complaint unless the plaintiff can prove no set of facts which would entitle her to relief. See Conley v. Gibson, 355 U. S. 41 (1957). Yet this Court and the lower court totally ignored the "standard" presented in Haines v. Kerner, 404 U. S. 519 (1972), that it does not appear "beyond doubt that [Appellant] can prove no set of facts in support of her claim which would entitle [her] to relief." Crisafi v. Holland, 655

F.2d 1305, 1309 (1981).

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent achievement of that end. Maty v. Grasselli Co., 303 U. S. 197 (1938).

As Justice Black so aptly stated in Conley v. Gibson,

355 U. S. 41, 47:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly

> the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Too, "[p]roper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. Maty v. Grasselli Co., 303 U. S. 197 (1938).

"[The] district court dismissed ... complaint on the ground that it did not state a claim for which relief could be granted. This is a dubious practice ...." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

In dismissing the Appellant's complaint,

the district court also stated that the Appellant had not complied with the "heightened pleading" standard. Yet, even though the district court might be forgiven:

> Dismissal of a claim requires the most close analysis by an appellate court, balancing the overall liberal thrust of the simplified civil rules on the one hand, see generally 5 Wright & Miller, Federal Practice and Procedure, Sections 1216, 1357, against the repeated demands by ... courts that there be more than conclusory allegations, even in civil rights cases. Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

> Therefore, although we must ask whether the "claim" put forward in the complaint is capable of being supported by **any conceivable set of facts**, we insist that the claim at least set for **minimal facts**, not subjective characterizations, **as to who did what to whom and why**. [Emphasis added]. See Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

This demand, however, as set out in a dissenting opinion in Siegert v. Gilley, 895 F.2d 797, 806-807 (D.C. Cir. 1990), should give pause:

> It is worth remembering that our heightened pleading standard has not as yet even been explicitly approved by the Supreme Court.

And finally, even if the arrest and incarceration of the Appellant was, as Appellees have stated, inadvertent:

> ... judges are not absolutely immune from liability and damages for administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform; it is nature of function performed --adjudication --rather than identity of actor who performed it -- judge -- that determines whether absolute immunity attaches to act. Forrester v. White, 108 S.Ct. 538 (1988)

WHEREFORE, Appellant prays this Honorable Court grant this petition for rehearing and accept her suggestion for *en banc* consideration for without such an opportunity, Appellant will have been denied any vindication of her constitutional rights.

Respectfully submitted,

/s/ Shirley M. Kearing
SHIRLEY M. KEARING, Appellant

FILED AUGUST 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Leon R. and Shirley M. Kearing Appellants	)	
v.	)	Civil Action Number 90-7098
John W. Guinee, Jr. Appellant [sic])	)	

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE FOR SUMMARY AFFIRMANCE

Appellee, John W. Guinee, Jr. ("Guinee" or the "Trustee"), the trustee in the Chapter 11 bankruptcy case of appellants, Leon R. and Shirley M. Kearing (the "Debtors"), respectfully moves, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, for dismissal of this appeal, or in the alternative, for summary affirmance of the District Court's June 4, 1990 order. As grounds for this motion, appellee states as follows:

I. Procedural History

On December 10, 1986, appellants filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C., in the Bankruptcy Court for the District of Columbia (Case Number 86-00913). Because the Debtors, as debtors-in-possession, were unable to formulate a successful plan of reorganize [sic] or to otherwise administer the estate, Guinee was appointed Chapter 11 Trustee on December 15, 1987. Throughout the bankruptcy proceeding, the Debtors have failed, and Shirley Kearing has fervidly refused, to cooperate with the Trustee in his efforts to administer property of the estate. Since the appointment of the Trustee, the Debtors, for the most part, have not been represented by counsel. In their efforts to frustrate the Trustee in resolving the bankruptcy case, the Debtors have initiated no less than nine separate

proceedings in the District Court and the Court of Appeals, consisting of various appeals from orders of the Bankruptcy Court, petitions for writs of mandamus, a separate actions for damages against various parties and participants in the bankruptcy proceeding. In these proceedings, the Debtors have repeatedly alleged that the Bankruptcy Court, the U. Trustee, the appointed Trustee, counsel f the Trustee, and their former counsel hav acted without authority in their bankrupt proceeding. The rulings issued in these proceedings have established that the Debtors' allegations are without merit.

This most recent appeal relates to the sale of the Debtors' former residence located at 4801 Van Ness Street, Washington, D.C. (the "Van Ness property" and the contempt proceedings against the Debtors resulting from their obstruction

the Trustee's efforts to sell the property.

Subsequent to his appointment, the Trustee attempted to obtain certain financial information from the Debtors and to obtain access to the Van Ness property. As a result of the Debtors' refusal to cooperate with the Trustee, the Bankruptcy Court issued on April 23, 1988, upon the Trustee's motion, an order directing the Debtors to provide financial information to the Trustee and to cooperate with the Trustee in his efforts to obtain offers for the purchase of the Van Ness property and in every other effort which he undertook in the fulfillment of his statutory duties. A copy of the April 23, 1988 order is attached hereto as Exhibit A.

The Debtors failed to comply with the order compelling their cooperation, and the Trustee filed a motion for an order requiring the Debtors to show cause why

they should not be held in contempt. The Bankruptcy Court issued an order, on September 30, 1988, holding Shirley Kearing in civil contempt ("First Contempt order"). The First Contempt order is attached hereto as Exhibit B. Leon Kearing was not held in contempt and was discharged from the Bankruptcy Court's order to show cause. The First contempt [sic] order was appealed to the District Court in connection with other matters, and on August 2, 1989, the District Court affirmed the Bankruptcy Court's contempt order. No appeal was taken from the District Court's order. Therefore, the basic ruling that the Debtors were to cooperate and could be held in contempt for failing to do so is the law of the case and was not challenged by the Debtors in further appeals.

A second motion for a show cause order was filed by the Trustee following Leon

Kearing's continued failure to comply with the original order compelling cooperation and Shirley Kearing's further acts of contempt of that order. This second show cause motion was transferred to the District Court upon the request of the Bankruptcy Judge for a partial withdrawal of reference pursuant to District Court Local Rule 602(a). After a hearing, the District Court entered an order on October 31, 1989 finding the Debtors in contempt of the Bankruptcy Court's order compelling their cooperation with the Trustee and prohibiting them from taking any action to interfere with the Trustee's efforts to sell the Van Ness property ("Second Contempt order"). A copy of the Second Contempt order is attached hereto as Exhibit C. The Second Contempt order also provided that if the Debtors failed to cooperate with the Trustee, upon the

Affidavit of the Trustee reflecting such non-cooperation, the Debtors would be arrested and incarcerated until they demonstrated a plan of cooperation completely satisfactory to the Court. The October 31, 1989 contempt order was consented to by the Debtors and was not appealed.

Thereafter, the Trustee obtained purchasers for the Van Ness property. After notice of the proposed sale was served on the Debtors and other parties in interest, Shirley Kearing threatened to obstruct the sale. Pursuant to the Second Contempt order, the Trustee filed a motion for issuance of an order of incarceration. Shirley Kearing appeared at the hearing on the motion, represented by counsel, and signed the order which is the subject of this appeal, acknowledging that she understocd the order. The June 4, 1990

order, in effectuating the Second Contempt order, prohibits the Debtors from, inter alia, taking any action, or causing any other person to take any action, of any kind to interfere with the Trustee's efforts to sell the Van Ness property, and prohibits them from going within 100 yards of the property. A copy of the June 4, 1990 order is attached hereto as Exhibit D. The June 4, 1990 order further states that if either of the Debtors violates either the order or the October 31, 1989 contempt order, he or she shall be arrested and incarcerated, upon the affidavit of the Trustee.

II. Motion to Dismiss Appeal

The District Court's June 4, 1990 Order, which is the subject of this appeal, is an interlocutory order implementing a previous Order, the Second Contempt order entered on

October 31, 1986 [sic] and never appealed. As the Debtors have filed this appeal without obtaining leave to appeal pursuant to Rule 5 of the Federal Rules of Appellate Procedure, the appeal should be dismissed.

In the Second Contempt order, the District Court found the Debtors in civil contempt for their repeated interference with the Trustee's legitimate endeavors to resolve their bankruptcy. As a consequence, the District Court's Second Contempt order prohibited them from continuing to interfere with the Trustee's efforts to sell the Van Ness property. Upon the Debtors' continued failure to comply with the Second Contempt order, the June 4, 1990 order was issued for the purpose of clarifying and effectuating the Second Contempt order. The June 4, 1990 order does not finally determine any aspect of the bankruptcy case, but merely decides

an intervening matter relating to the sale of property of the estate. See Collier on Bankruptcy, ¶ 3.03 (15th ed. 1990); Matter of Xonics, Inc., 813 F.2d 127, 130 (7th Cir. 1987) (holding that a judge's refusal to hold a party in civil contempt is not an appealable final order). A final judgment is one which disposes of the whole subject matter, gives all the relief that was contemplated, and leaves nothing to be done to adjudicate the cause on the merits. Id. (citing Catlin v. United States, 324 U.S. 229 (1945); City of Louisa v. Leiu, 140 F.2d 512, 514 (6th Cir. 1944). The June 4, 1990 order was not dispositive of the whole merits of the cause, but only addressed the intervening matter of the Debtors' contempt with respect to the Trustee's efforts to sell the property. The actual subject matter of the proceeding, the motion on the sale of the Van Ness property, was still

pending before the Bankruptcy Court at the time the June 4, 1990 order was entered.

Further, the June 4, 1990 order was not a separate injunctive order, but an order entered to clarify and effectuate the Second Contempt order. It did not involve any subject matter not addressed in the Second Contempt order. The Debtors did not seek to appeal the Second Contempt order, and the time for appealing that order has since long passed.

However, even if the June 4, 1990 order were construed as a separate contempt order, it is still not appealable as of right. A civil contempt order is interlocutory and, as to a party to the litigation, an appeal is not available until there is a final judgement in the entire action. Wright & Miller, Federal Practice and Procedure [sic]: Civil § 2960 at 592 (citing [sic] Fox v. Capital Co.,

299 U.S. 105 (1936); Duell v. Duell, 178 F.2d 683 (D.C. Cir. 1949). As the Debtors have failed to obtain leave to appeal the interlocutory order, or to demonstrate why an interlocutory appeal should be allowed, their appeal should be dismissed.

Finally, the Debtors' Statement of Issues does not allege any specific error on the part of the District Court in entering the June 4, 1990 order. The Debtors state as their issue on appeal:

> Is there a duly appointed an [sic] legally qualified trustee in this bankruptcy proceeding who has any standing to present any motion before any federal court for the District of Columbia -- indeed, in any court of law or equity?

This issue does not relate to the June 4, 1990 order, which deals with the October 31, 1989 order finding the Debtors in contempt.

III. Motion for Summary Affirmance

Alternatively, appellee moves for summary affirmance of the District Court's order on the grounds set forth above in support of appellee's motion to dismiss the appeal. The merits of this case "are so clear as to justify expedited action," see Walker v. Washington, 627 F.2d 541 (D.C. Cir.) (per curiam [sic]), cert. denied, 449 U.S. 994 (1980), and further briefing and argument are not necessary to a just disposition of this appeal, see United States v. Glover, 731 F.2d 41, 44 (D.C. Cir. 1984).

As stated above, the June 4, 1990 order is an interlocutory order entered by the District Court to effectuate the Second Contempt order and does not present any new, appealable issues. The Debtors' Statement of Issues neither alleges any specific error on the part of the District

Court in entering the June 4, 1990 order nor identifies any new issue presented by the June 4, 1990 order.

Further, the Debtors have brought the issue of the Trustee's authority to act in their bankruptcy case before the Bankruptcy Court, the District Court, and this Court of Appeals in numerous motions and appeals. It has been established repeatedly throughout this case that the actions taken by the Trustee in the discharge of his statutory duties have been, in all respects, appropriate, including his efforts to obtain the cooperation of the Debtors.

The order which is the subject of the Debtors' notice of appeal was signed by Shirley Kearing at the hearing before the District Court, as an acknowledgement that she understood the order. She was represented by counsel at the hearing on

the Trustee's motion, and signed the order voluntarily.

WHEREFORE, appellee respectfully moves for entry of an order dismissing this appeal as interlocutory or, in the alternative, for an order summarily affirming the District Court's June 4, 1990 order.

Dated: August 7th, 1990

Respectfully submitted,

/s/ Peter R. Kolker

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FILED AUGUST 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	
Appellants, Pro Se	)	
	)	
v.	)	No. 90-7098
	)	
John W. Guinee, Jr.	)	
	)	

EMERGENCY MOTION FOR RECONSIDERATION
FOR A STAY OF ALL JUDGMENTS, ORDERS, DECREES
AND FOR OTHER RELIEF PENDING APPEAL

COMES NOW, Leon R. and Shirley M. Kearing, as Movants and Appellants, pro se (referred to hereinafter as "the Kearings"), and move that this Honorable Court issue the granting of an emergency motion for a stay of ALL judgments, orders, decrees; for ANY further participation in the Bankruptcy Court and/or the District Court for the District of Columbia

pertaining to the Kearing's bankruptcy proceeding or any and/or all other proceedings emanating from that bankruptcy proceeding; and for other relief from John W. Guinee, Jr., 1514 Inlet Court, Reston, Virginia, Attorney Peter R. Kolker and/or all attorneys and any and/or all other employees of the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, 1201 Connecticut Avenue, N. W., Washington, D. C. (or at any other office under their direct control and supervision), the Clerk of the United States Bankruptcy Court for the District of Columbia, the United States Bankruptcy Judge for the District of Columbia, the District Court for the District of Columbia, the United States Trustee for the District of Columbia, the assistant United States Trustee for the District of Columbia and the United States Marshals for the District of Columbia

during the pendency of ALL the Kearing's appeals in this Court and until the entry of a final judicial determination of the appropriateness of such judgments, orders and decrees of the United States Bankruptcy Court and District Court for the District of Columbia entered in this Chapter 11 proceeding.

Final judicial determination shall mean a certified decree, a copy of an order of judgment which is binding and valid upon the Kearings from a court of competent jurisdiction of which no further appeals are permitted, or the time for appeal therefrom has expired.

As grounds in support of their emergency motion for reconsideration the Kearings state as follows:

1. This Honorable Court has jurisdiction over this emergency motion pursuant to the United States Constitution,

Amendment V; Rules 2, 8, 25, 27(c) and 47 of the Federal Rules of Appellate Procedure; Rule 7(h)(1)(a), (b), (c) and (2) of the General Rules of the United States Court of Appeals for the District o Columbia and 28 U.S.C. 1334(b).

2. On the original consideration of the Appellants motion for a stay of proceedings concerning the sale of their property located at 4801 Van Ness Street, N. W., Washington, D. C., this Court, on its own motion, to the extent of a June 20 1990, bankruptcy court order, dismissed fo lack of jurisdiction and on the Kearing's motion for stay of that order the Court dismissed their motion as moot.

The Court then proceeded to explain tha Courts of appeals do not have jurisdictio to consider direct appeals from bankruptcy court orders.

Continuing, this Court, on its own

motion, to the extent of a June 4, 1990, district court order, denied the Kearing's motion for a stay since the Kearings had neither first sought a stay from the district court nor explained their reason for not doing so; and, in any event, the Kearings had not demonstrated that they would incur irreparable harm absent a stay.

3. This is not what the Kearings intention had been in asking this Court for a stay; i.e., forget about the rulings, hone in on the participants involved in those rulings. Too, the Court remained mute to the Kearing's request for the Federal Bureau of Investigation to enter into this proceeding and, pursuant to 28 U.S.C. 586(a)(3)(F), root out the evil now permeating it.

What the Kearings did intend to do was to show this Court that since the presiding judge and clerk for the Bankruptcy Court

for the District of Columbia, the United States Trustee and the assistant United States Trustee for the District of Columbia, the appointed but as of yet unqualified trustee along with his counsel and his counsel's law firm involved in these proceedings had participated in, onc again, another sale of the Kearing's property and that all of them were Appellees in a case[s] now pending before this Court (all of which, incidentally, have wound their proverbial procedural way to legitimately reach this Court), that entire group of pettifoggers were "tainted and should be restrained from any action pertaining to this case and by asking for stay to prohibit these Appellees from any further chicanery, the Kearings reasoned that since this Court has jurisdiction ove the appeal[s] involving these Appellees, j well has the authority to stay any further

damage done to the Kearings by those Appellees' actions since all of them are parties to a pending decision by this Court and the Kearings have sought, more than a dozen times, stays in the lower courts.

4. The Kearings, on information and belief, maintain that the so-called trustee in this bankruptcy proceeding, along with the acquiescing parties named above, is currently "racing the clock" in order to immediately rid the Kearing estate of all tangible real and personal property and take all the proceeds for administrative expenses -- with legitimate creditors receiving no payment whatsoever -- thereby effectively rendering what should be a reorganization case into a no-asset case thus making any and/or all of the Kearing's appeals moot, whether in this Court or the District Court, since all of their assets will be gone.

And once that final piece of property i
sold [4801 Van Ness Street, N. W.,
Washington, D. C.] the so-called trustee i
at liberty to recommend conversion of this
case to a Chapter 7 Liquidation (whereby a
new trustee would be appointed and
strapped, along with the Kearings, with an
outrageous tax liability problem) and then
what will become the former so-called
trustee would be absolved of any and all
further responsibility. But, of course,
the Kearings will be left with a new
trustee and a new tax problem.

And all of this can be done, and
probably will be, albeit with unmitigated
gall while this so-called trustee has file
no plan of reorganization whatsoever in
over two years, has not paid one creditor
and all the while has attempted to wrap
himself in the robes of the Bankruptcy
Court while any protections which should b

afforded the Kearings has been totally lacking in this case due to non-feasance, misfeasance and malfeasance of those above-named individuals responsible for protecting those safeguards.

5. The Kearings are well aware that four relevant factors should be considered for the issuance of a stay pending appeal and believe that their current situation overwhelmingly comports with three of the criteria [the fourth, irreparable harm to others, appears to be minimal except to the pocketbook of some of the Appellees]:

(1) Likelihood of success on the merits in appeal;

The Kearings currently have pending in this Court three separate and distinct appeals that are directly related. The basic underlying question on all three is simple and succinct:

> Is there a duly appointed and legally qualified trustee in

this bankruptcy proceeding wh
has any standing to present
any motion before any federal
court for the District of
Columbia -- indeed, in any
court of law or equity?

First, the Kearings do not believe that they are, in fact, legally in bankruptc proceedings since the requirements of Section 322 of Pub.L. 99-353, July 10, 1984, Section 283(aa) of Pub.L. 99-554, October 27, 1986, F.R.Civ.P. 11 and Bankruptcy Rule 9011 were totally disregarded; however, if this Court doe find that the Kearings were swept up, indeed, illegally in bankruptcy proceedings, there is no need to go forward as the following becomes irrelevant. Conversely, if this Court finds that the Kearings are under the jurisdiction of the Bankruptcy Court fo the District of Columbia, then the Kearings believe that the following

grievous and callous errors, mistakes, and unadulterated insanity that has occurred in this case are most pertinent for the likelihood of success in their appeal pending before this Court; to wit:

> The United States Trustee never complied with his duties, pursuant to 11 U.S.C. 1102(a)(1), by his failure to appoint a committee of unsecured creditors -- regardless of his lame excuse in not believing that any could or would serve; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(A), by failing to monitor or investigate applications for compensation and reimbursements allowed or applied for under 11 U.S.C. 326, 328, 329, 330, and Rule 2016 of the Rules of Bankruptcy Procedure; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(B), by failing to monitor any plan of reorganization and to ascertain why no disclosure statement was, or has been, ever filed when the Kearings, as debtors-in-possession, did file one; he never complied with his duties, pursuant to

28 U.S.C. 586(a)(3)(F), by h
failure to notify the
appropriate United States
Attorney of matters which
constitute a crime under the
laws of the United States;
and, he never complied with
his duties, pursuant to 28
U.S.C. 586(a)(3)(G), by
failing to monitor the
progress of this case and to
assure that all officers of
the Court are adhering to th
Code of Professional Conduct
as determined in In re Smith
5 B.R. 92 (Bkrtcy. D. DC
1982).

The Clerk of the Bankruptcy
Court for the District of
Columbia has failed miserabl
to perform his duties under
Rule 9011 and 2013 of the
Rules of Bankruptcy Procedur
-- even though the Kearings
have ask not only this Court
but the District Court also
issue a writ of mandamus to
force his performance.

The Kearings, as debtors-in-
possession, fully complied
with their fiduciary duties
this proceeding and could no
be removed as debtors-in-
possession since the
Bankruptcy Court sent no
notice and held no hearing a
required by 11 U.S.C. 1102,
received no testimony, enter
no evidence, neither analyze
nor weighed any cost/benefi

> or cost/protection for appointment of a trustee; yet, the Bankruptcy Court found "cause" even though there had been no fraud, dishonesty, incompetence or gross mismanagement on the part of the Kearings and that the expense and inconvenience of a trustee was, and is, an adverse factor to any successful reorganization of this bankruptcy proceeding.
>
> It is abominable that neither an examiner was appointed in this proceeding as requested under 11 U.S.C. 1104(b)(1) by the Kearings in an application for an expedited hearing for such an appointment nor was any notice or hearing forthcoming from that application.
>
> Regardless, the appointment of a trustee was totally inappropriate since no notice was given and no hearing on any motion for that appointment as mandated by 11 U.S.C. 1102 was held.

Also pending on appeal in this Court is an order of April 23, 1988, of the Bankruptcy Court "approving agreement in settlement of motions seeking relief from stay,

compromising mutual claims and authorizing trustee to execute deeds in lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C."

The Kearings maintain that this order - a transfer of property back to one of the creditors -- was not "interlocutory" but "final" under 28 U.S.C. 158(a) and the Kearings were not to be humiliated by having to ask permission of the District Court to appeal this loss of property in that:

> The findings of fact by the Bankruptcy Court were clearly erroneous under Rule 8013 of the Rules of Bankruptcy Procedure in dealing with thi transfer of property.
>
> Nowhere did the Appellee, in seeking relief from the automatic stay incurred in bankruptcy and in having this property transferred back, meet the two-prong burden of proof test under 11 U.S.C. 362(d)(2) and (g)(1) since th Kearings had, and have, equit

in the collateral and that collateral is necessary for an effective reorganization.

The Appellee also had adequate protection in that no relief should have been granted from the stay because:

(a) continuation of stay would not result in undue risk of material harm;
(b) a plan had been presented by the Kearings [no disclosure statement has ever been made] for a reasonable and possible reorganization;
(c) the property was needed for reorganization;
(d) there was equity in the property for benefit of debtor and the creditors.

The Appellee did not have any problem resulting from Article 9 of the Uniform Commercial Code because there is, and was, no risk that the property could be lost in cash proceeds being commingled -- assuming the Appellee, under Article 9-306 had a perfected security interest in any proceeds of the Kearings to begin with.

This transfer of property, under any stretch of the imagination, was not, and is not, a "core" proceeding but

is a proceeding "related to" this Title 11 case in the Bankruptcy Court; and this transfer definitely will not pass muster when tested against the criteria set fort in the United States Supreme Court decision in the Norther Pipeline case, which provides that when controversy arises out of state law, it may only be adjudicated with the federal system, by an Article III court; and Article I judges have no subject matter jurisdiction.

If nothing else, the Bankruptcy Judge, under 28 U.S.C. 157(b)(3), should have determined, on his own motion -- if nothing else -- whether this proceeding was a "core" proceeding under 28 U.S.C. 157; or was [read is] a "related" proceeding and coul be heard only as a "non-core, related proceeding, wherein proposed findings of fact and conclusions of law should hav been submitted to the Distric Court pursuant to 28 U.S.C. 157(c)(1)?

Too, if the Bankruptcy Judge had any reservations he should, either under 28 U.S.C 1334(c)(2) [mandatory abstention] or 28 U.S.C. 1334(c)(1) [voluntary abstention], have invoked one or the other in this transfer

of property.

And, finally, in this appeal an appointed, but unqualified trustee, whether "de facto" or not -- especially when contested by a party in interest, does not have the unmitigated right to transfer property under 11 U.S.C. 363 in this proceeding especially when the Appellee may not be protected by 11 U.S.C. 363(m) in that reversal or modification of an appeal of the sale or lease of property authorized under the Bankruptcy Code does not affect the validity of a sale under such authorization to an entity that purchased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization was stayed pending appeal even though the 9th Circuit Court of Appeals has "carved out a narrow exception to this rule, where real property is sold to a creditor who is a party to the appeal" and where "it would not be impossible for the Court to fashion some sort of relief"? See In re Sun m Valley Ranches, Inc., 823 F.2d 1373 (9th Cir. 1987) at page 1375, since Standard Federal found use of this cite to defend the "mootness" issue of this transfer but failed to

continue to the very next paragraph below their quote which then proceeds to state the "exception" ruling which noted "a narrow exception to this rule, where real proper is sold to a creditor who is party to the appeal" and whe "it would not be impossible for the Court to fashion som sort of relief".

In one of the other Kearing's appeals, Shirley M. Kearing was illegally arrested and incarcerated on a contempt order directly out of the Bankruptcy Court for the District of Columbia. And, to add insult to injury, she has been continuall harangued and harassed with having to appear at over ten (10) hearings concern that contempt; and this Court currently h her appeal from the District Court where she contends that the District Court for the District of Columbia erred in that it

Did not allow her to invoke the pro se protection found Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed2d

652 (1972);

Found that she failed to state a "Bivens claim" (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), even though her complaint alleged that the individuals named, ACTING ("under color of law") IN AN OFFICIAL CAPACITY, violated her due process rights; Stated that she failed to state a "claim" under Rule 12(b) of the Federal Rules of Procedure when, in fact, she defined the Appellees actions as "malfeasance, misfeasance and nonfeasance of duty" along with "blatant and malicious use of process" in denying Appellant's guaranteed fundamental protection of "due process";

Found that the United States Bankruptcy Judge for the District of Columbia has contempt powers under Rule 9020 of the Bankruptcy Rules of Procedure, notwithstanding the "Omega ruling" as found in In Re Omega, 51 B.R. 569 (D.C. 1985);

Assumed that there is a legally appointed and duly qualified trustee in this bankruptcy proceeding who has authority to present a motion for show cause for contempt

and seek sanctions by the Bankruptcy Court under Rule 9020 of the Bankruptcy Rule of Procedure and that trust and his attorneys are "quas judicial" officials;

Stated that her arrest and incarceration was due to negligence thereby avoiding constitutional tort claim under 42 U.S.C. Section 198

Found that the United State Trustee and the assistant United States Trustee were only involved in the appointment of the so-calle trustee; and, that it in an of itself "do[es] not amoun to a specific allegation of constitutional violation" w 11 U.S.C. 1104(c), 28 U.S.C Section 586(A),(B),(F) and (G), and In re Smith, 5 B.R 92 (Bkrtcy. D. DC 1982), proscribe otherwise;

Found that the she failed t state a Respondeat Superior claim against the United States Trustee and the Unit States Marshal in light of what

Haynesworth v Miller, 820 F.2d 1245 (DC Cir. 1987), a 1262 [13] and footnote 139, page 1263 said;
Found that she failed to me the "heightened pleading

standard" by alleging violation of "due process" under the Fifth Amendment of the Constitution of the United States leading to illegal arrest and incarceration -- that in and of itself being a "specific deprivation of her rights" that are "clearly established," when viewed in light of In Re Omega, supra, which prohibits, unequivocally, the very actions that all the Appellees undertook and then succeeded in accomplishing;

Contorted the use of Bradley v. Fisher, 80 U.S. 335 (1871) and Stump v. Sparkman, 435 U.S. 349, given the Supreme Court's explanation and example in Stump at p. 356-7 along with citing from Bradley, 13 Wall., at 352, protected the Appellees when the "Omega ruling" in the District of Columbia explicitly states that an Article I judge dealing with contempt in the District of Columbia wanders into pastures exclusively reserved for Article III adjudication; and, is an Article I judge in the District of Columbia absolutely immune" when he knew, **IN ADVANCE**, that there is a "clear absence of **ALL** jurisdiction" for contempt sanctions by him; and

Decided that the Clerk of t
Bankruptcy Court for the
District of Columbia and
United States Marshals for
District of Columbia were
under "mistaken belief" tha
they were carrying out a va
contempt order of the Unite
States Bankruptcy Court for
the District of Columbia by
causing her to be arrested
October 14, 1988, and there
they were protected by 28
U.S.C. Section 566(a) and
therefore "absolutely immun
even when taken in context
with Haynesworth, supra.

(2) Irreparable harm to those seeking stay;

When the Kearings first sought legal adv
and assistance about their financial
dilemma in 1986, their assets were
$1,166,327.66 including equity in five (
real estate properties.
Their total indebtedness was only
$977,961.47 -- roughly $265,000.00 less
than their assets -- a far cry from
insolvency in anybody's ledger.

Following the advice of what could on

be termed a "shyster lawyer" there has since been a willful and flagrant wasting of the assets of their estate tantamount to profligate improvidence by the insipid actions of the aforementioned appointed but unqualified trustee, John W. Guinee, Jr., his counsel and his counsel's law firm, the United States Trustee, the Assistant United States Trustee, Bankruptcy Judges and District Judges for the District of Columbia, wherein the Kearing's fortunes are now being disembogued of all their assets; and as of the date of the filing of this emergency motion, they are now on their way, lead by this appointed yet unqualified trustee, et al, to owing the Internal Revenue Service taxes hovering around the neighborhood of $800,000.00 and not one piece of property left.

(3) Ill-effect on the public interest

This entire proceeding has become such a "travesty of justice" that the chilling effect on bankruptcy practice throughout this country is in jeopardy if these gros irregularities are allowed to germinate, sprout and spread.

The bankruptcy process is a structured basically administrative, field governed constitutional and statutory law with definitive restrictions placed upon all t participants.

But this proceeding has become such a glaring example of "inside players making up the rules as they go along" that only the myopic would be remiss to encounter t utter contempt and disregard these "players" have had of the Kearing's right to "due process" under the law as guaranteed by Amendment V of the United States Constitution and all the other

myriad laws, procedures and protections that rightfully should be afforded them and others who haplessly wander into the quagmire of bankruptcy only to realize too late that the courts -- in the Kearings case particularly -- have refused commitment to "equal justice under law" which only reinforces the Kearing's belief that "[a] casual attitude toward human hurt and pain is the surest sign ... [of] the beginning of the end of a free society."

The Kearings truly believe that all of the prevalent factors they have set forth herein are most obvious for seeking this emergency motion for reconsideration for a stay and that the above should have shed more light on their plight.

WHEREFORE the Appellants pray this Court

to issue such a stay no later than this

7th day of August, 1990.

/s/ Shirley M. Kearing
SHIRLEY M. KEARING
Appellant, Pro Se

/s/ Leon R. Kearing
LEON R. KEARING
Appellant, Pro Se

FILED JULY 14, 1990
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	File No.
Movants, Pro Se	)	
	)	
Debtors, Pro Se	)	Bankruptcy Case
	)	No. 86-00913
	)	(Chapter 11)
	)	
Appellants, Pro Se	)	District Court
	)	Appeal Case
	)	No. 88-1232 TPJ

ADDENDUM AND MEMORANDUM TO
EMERGENCY MOTION FOR A STAY OF ALL
JUDGMENTS, ORDERS, DECREES
AND FOR OTHER RELIEF PENDING APPEAL

COMES NOW, Leon R. and Shirley M. Kearing, as Debtors, Appellants and Movants, pro se (hereinafter referred to as "the Kearings"), and move that this Honorable Court issue the granting of the stay of ALL judgments, orders, decrees and for other relief as filed on July 3, 1989, no later than Friday, July 14, 1989.

The Kearings are well aware that four

relevant factors should be demonstrated for the issuance of a stay pending appeal and believe that they have complied in the:

(a) likelihood of success on the merits of their appeal;
(b) irreparable harm to them;
(c) no harm to any other party if stay is granted; and
(d) ill-effect on the public

interest by violation of their "due process" rights and refusal of the Clerk of the Bankruptcy Court to maintain records mandated to be kept.

The Kearings also believe that all of the prevalent factors are most obvious in their emergency petition and motion and that the following should shed more light on the emergency nature of this case.

Since the filing of the Kearings' original petition when the assets of their estate EXCEEDED their liabilities by approximately $265,000.00 as listed in the bankruptcy schedules [Assets of

$1,166,327.66 including equity in five (5) real estate properties and $977,961.47 in liabilities - a far cry from insolvency], there has been a willful and flagrant wasting of the assets of their estate tantamount to profligate improvidence by the aforementioned appointed trustee, John W. Guinee, Jr., the United States Trustee, Bankruptcy Judges and District Judges for the District of Columbia, wherein the estate of the Kearings has been disembogued of almost all of its assets; and as of the date of the filing of this motion, their estate now has incurred, through an appointed yet unqualified trustee, et al, non-dischargeable liabilities (taxes) hovering around the neighborhood of $800,000.00.

On information and belief, the so-called trustee is currently "racing the clock" to rebuild the Kearings' burned-out home so

that he may immediately put it on the real estate market, sell the property and take the proceeds for administrative expenses -- thereby rendering the Kearings' Chapter 11 case a no-asset case and effectively making any and/or all of their appeals moot.

Once this final piece of property is sold, the so-called trustee may then convert this case to a Chapter 7 (whereby a new trustee would be appointed and strapped, along with the Kearings, with the outrageous tax liability problem) and the current so-called trustee would be absolved of any and all further responsibility.

In addition, this so-called trustee has perjured himself with the City of Washington, D. C., by stating in an application for a permit needed to rebuild the Kearings' home that he is the legal owner of the Kearings' property; has engaged tradesmen, unlicensed in the City

of Washington, D. C., to hastily and shoddily rebuild without proper inspections; and, with unmitigated gall, has wrapped himself in the robes of the Bankruptcy Court by obtaining an order to keep the Kearings off of their own property.

The mortgagee of that property has more than adequate protection in that it has withdrawn any motion for "adequate protection."

We beg this Court to please stop this today.

Dated: July 14, 1989

/s/ Shirley M. Kearing
Shirley M. Kearing
Debtor-Appellant-Petitioner-Movant, Pro Se

/s/ Leon R. Kearing
Leon R. Kearing
Debtor-Appellant-Petitioner-Movant, Pro Se

JUNE 1, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING, Appellant,	)	
v.	)	No. 90-5062
	)	(C.A. No. 89-02837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Appellees.	)	

APPELLANT'S RESPONSE TO
MOTION TO DISMISS COMPLAINT

1. Defendants (1) John W. Guinee, Jr. ["Guinee"], (2) Peter R. Kolker ["Kolker"]; (3) Renee Franklin Hill ["Hill"]; and (4) Zuckerman, Spaeder, Goldstein, Taylor & Kolker ["Zuckerman, Spaeder"], by counsel, have moved, pursuant to Fed.R. Civ. P. 12(b)(6) to dismiss the complaint in this action, with prejudice.

2. These Defendants state that the Plaintiff sues upon her arrest by the United States Marshal PURSUANT TO A FACIALLY VALID ORDER OF THE UNITED STATES

BANKRUPTCY COURT [emphasis added]; thereby, no grounds exist for which plaintiff may be granted relief.

But the Supreme Court of the United States has been most enlightening in Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) concerning judicial immunity.

Undoubtedly, the Defendants, through counsel, through lack of advertence, misread that decision.

3. These Defendants, however, blatantly premise their motion for dismissal upon the erroneous and misconceived notion that the Bankruptcy Court of the District of Columbia has jurisdiction in matters of contempt.

4. But there is a "clear absence of jurisdiction" for the Bankruptcy Court for the District of Columbia to punish as expressed by the "Omega ruling" which does

not allow that Court to inflict such mulct. See In re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985).

5. In that decision the District Court [Jackson, J.] aphorized:

> BANKRUPTCY JUDGES AT PRESENT CANNOT BE, AND HAVE NOT BEEN, ENDOWED WITH CONTEMPT POWER, BUT RATHER, IN MATTERS OF CONTEMPT ARE LIMITED TO THE SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TO THE PARENT FEDERAL DISTRICT COURT, WITH A FINAL ADJUDICATION OF CONTEMPT TO EMANATE, IF AT ALL, FROM THE DISTRICT JUDGE FOLLOWING DE NOVO REVIEW [emphasis added].

6. And if the specifics of that decision remain unclear to these defendants, then perhaps counsel for these defendants might peruse In Re Sequoia Auto Brokers Ltd, Inc. v. Idell, 827 F.2nd 1281 (9th Cir. 1987).

In this case, a bankruptcy court found Idell in civil contempt; the District Court reversed; and, then, the 9th Circuit Court vacated the district court's order and

remanded with directions to vacate the bankruptcy court's order for LACK OF JURISDICTION [emphasis added].

The 9th Circuit Court found that Article III of the United States Constitution "is the source of this inherent power to punish contempt" and "... bankruptcy courts do not derive their authority from article III..." in that:

> ... Congress created bankruptcy courts pursuant to its substantive authority over bankruptcies. U. S. Const. art I, Sec. 8, cl.4. Unlike an article III court, A BANKRUPTCY COURT HAS NO NECESSITY [emphasis added] to invoke an inherent contempt power to vindicate its authority ....

Be that as it may, the 9th Circuit then explored the possibility that "... bankruptcy judges have jurisdiction to exercise the contempt power only if they have a statutory basis for that authority."

The Court found "[t]here is no express statutory authority granting the contempt

power to bankruptcy judges."

So, the Court considered "... whether such power may be implied."

Argument in Sequoia had been made to the 9th Circuit to:

> ... assume that Congress granted bankruptcy judges civil contempt power, including the power to imprison, because there is no express language to the contrary.

The 9th Circuit's response is succinct:

> THIS WE WILL NOT DO [emphasis added]. If Congress had intended that bankruptcy judges should possess such power, it well knew how to confer it.

7. It is most interesting that the "Omega" ruling and the Sequoia decision by the 9th Circuit both comport explicitly and unequivocally in determining that bankruptcy judges DO NOT have either statutory or implied powers for contempt.

8. The foregone conclusion must then be that any bankruptcy judge who toys with contempt -- especially in the District

of Columbia or 9th Circuit -- does so in a "clear absence of ALL jurisdiction."

9. These Defendants also cite in their motion for dismissal the case of Mullis v United States Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987).

That decision merely stated that IF bankruptcy judges had absolute judicial immunity barring any act that was a "clear absence of all jurisdiction," it consequently followed that a trickle down effect would take place; i.e., that the clerk of the court and deputy clerks have quasi-judicial immunity when they perform tasks that are an integral part of the judicial process unless these acts were done in the "clear absence of all jurisdiction;" the trustee would also have absolute quasi-judicial immunity since he derives his immunity from the judge who

appointed him unless the trustee acts in the "clear absence of all jurisdiction."

10. The so-called trustee, "Guinee," one of the above defendants, is on even less solid ground than just a "clear absence of all jurisdiction."

Plaintiff has pending in the District of Columbia Court of Appeals the legality of this so-called trustee in that he failed to meet the requirements of 11 U.S.C. 1104 and 322; and, that he has NO STANDING whatsoever in ANY proceeding involving the Plaintiff.

11. The only remaining defense in this complaint would be either an "error" or an "act in excess of all jurisdiction" by the Bankruptcy Court for the District of Columbia. Neither is applicable to this complaint.

However, all through the myriad number of proceedings on Plaintiff's contempt

[eight (8) at last count], Plaintiff forewarned all who would listen and, undoubtedly, some who didn't that the Bankruptcy Court for the District of Columbia did not have ANY authority to punish -- only from the District Court could such sanctions emanate.

But to no avail.

Plaintiff was arrested and incarcerated on motion for contempt by defendants above; the United States Trustee and his assistant did nothing to prevent this abominable act; the bankruptcy judge found the Plaintiff in contempt and signed the order for the arrest and incarceration; the Clerk of the Bankruptcy Court delivered that order to the United States Marshal for execution; and the dirty deed was done.

All of the defendants knew that the bankruptcy court for the District of Columbia was acting with a "clear absence

of all jurisdiction" for contempt.

12. Defendants in this matter, lastly, clasp to Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096 (9th Cir. 1986) in that "this dispute arises out of a bankruptcy proceeding" and should, therefore, be resolved in the bankruptcy court.

Lonneker will not suffice, though, as Plaintiff's complaint deals with complicity in perpetrating a contempt action by a non-Article III judge in the "clear absence of All jurisdiction" with the chilling effect of violating one of Plaintiff's most basic of Constitutional rights -- denial of due process.

Respectively submitted,

/s/ Shirley M. Kearing
Shirley M. Kearing, Plaintiff

FILED JUNE 1, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING, Appellant,	)	
v.	)	No. 90-5062
	)	(C.A. No. 89-02837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Appellees.	)	

APPELLANT'S RESPONSE TO A COURT ORDER
OF MAY 11, 1990

1. The federal Appellees, S. Martin Teel, Jr., et al., and other Appellees (1) John W. Guinee, Jr. ["Guinee"], (2) Peter R. Kolker ["Kolker"]; (3) Renee Franklin Hill ["Hill"]; and (4) Zuckerman, Spaeder, Goldstein, Taylor & Kolker ["Zuckerman, Spaeder"], by counsel, have moved, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and General Rule 7(i) for a summary affirmance of District Judge Gerhard A. Gesell's

February 13, 1990, order dismissing this action, with prejudice.

2. This Court, by order of May 11, 1990, required the Appellant (Shirley M. Kearing) to show cause, within twenty-one (21) days of the date of the order, why the motions should not be considered and decided without a response from her.

3. Appellant, through this document, responds to the arguments presented by both the federal Appellees and the other Appellees.

4. These Appellees state that the Appellant sues upon her arrest by the United States Marshal PURSUANT TO A FACIALLY VALID ORDER OF THE UNITED STATES BANKRUPTCY COURT [emphasis added]; thereby, no grounds exist for which Appellant may be granted relief.

But the Supreme Court of the United States has been most enlightening in Stump

v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) concerning judicial immunity.

Undoubtedly, the Appellees, through counsel, through lack of advertence, misread that decision.

5. These Appellees, however, blatantly premise their motion for dismissal upon the erroneous and misconceived notion that the Bankruptcy Court of the District of Columbia has jurisdiction in matters of contempt.

6. But there is a "clear absence of jurisdiction" for the Bankruptcy Court for the District of Columbia to punish as expressed by the "Omega ruling" which does not allow that Court to inflict such mulct. See In re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985).

7. In that decision the District Court [Jackson, J.] aphorized:

> BANKRUPTCY JUDGES AT PRESENT CANNOT BE, AND HAVE NOT BEEN, ENDOWED WITH CONTEMPT POWER, BUT RATHER, IN MATTERS OF CONTEMPT ARE LIMITED TO THE SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TO THE PARENT FEDERAL DISTRICT COURT, WITH A FINAL ADJUDICATION OF CONTEMPT TO EMANATE, IF AT ALL, FROM THE DISTRICT JUDGE FOLLOWING DE NOVO REVIEW [emphasis added].

8. And if the specifics of that decision remain unclear to these Appellees, then perhaps counsel for these Appellees might peruse In Re Sequoia Auto Brokers Ltd, Inc. v. Idell, 827 F.2nd 1281 (9th Cir. 1987).

In this case, a bankruptcy court found Idell in civil contempt; the District Court reversed; and, then, the 9th Circuit Court vacated the district court's order and remanded with directions to vacate the bankruptcy court's order for LACK OF JURISDICTION [emphasis added].

The 9th Circuit Court found that Article III of the United States Constitution "is

the source of this inherent power to punish contempt" and "... bankruptcy courts do not derive their authority from article III..." in that:

> ... Congress created bankruptcy courts pursuant to its substantive authority over bankruptcies. U. S. Const. art I, Sec. 8, cl.4. Unlike an article III court, A BANKRUPTCY COURT HAS NO NECESSITY [emphasis added] to invoke an inherent contempt power to vindicate its authority ....

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The Court found "[t]here is no express statutory authority granting the contempt power to bankruptcy judges."

So, the Court considered "... whether such power may be implied."

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> ... assume that Congress granted bankruptcy judges civil contempt power, including the power to imprison, because there is no express language to the contrary.

The 9th Circuit's response is succinct:

> THIS WE WILL NOT DO [emphasis added]. If Congress had intended that bankruptcy judges should possess such power, it well knew how to confer it.

9. It is most interesting that the "Omega" ruling and the Sequoia decision by the 9th Circuit both comport explicitly and unequivocally in determining that bankruptcy judges DO NOT have either statutory or implied powers for contempt.

10. The foregone conclusion must then be that any bankruptcy judge who toys with contempt -- especially in the District of Columbia or 9th Circuit -- does so in a "clear absence of ALL jurisdiction;" likewise, any other party who pursues such an undertaking while attempting to "wrap themselves within the judicial robes" of

this inferior court does so at his own peril.

11. These Appellees also cite in their motion for dismissal the case of Mullis v United States Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987).

That decision merely stated that IF bankruptcy judges had absolute judicial immunity barring any act that was a "clear absence of all jurisdiction," it consequently followed that a trickle down effect would take place; i.e., that the clerk of the court and deputy clerks have quasi-judicial immunity when they perform tasks that are an integral part of the judicial process unless these acts were done in the "clear absence of all jurisdiction;" the trustee would also have absolute quasi-judicial immunity since he derives his immunity from the judge who

appointed him unless the trustee acts in the "clear absence of all jurisdiction."

12. The so-called trustee, "Guinee," one of the above Appellees, is on even less solid ground than just a "clear absence of all jurisdiction."

Appellant has pending in the District of Columbia Court of Appeals the legality of this so-called trustee in that he failed to meet the requirements of 11 U.S.C. 1104 and 322; and, that he has NO STANDING whatsoever in ANY proceeding involving the Appellant.

13. The only remaining defense in this complaint would be either an "error" or an "act in excess of all jurisdiction" by the Bankruptcy Court for the District of Columbia. Neither is applicable to this complaint.

However, all through the myriad number of proceedings on Appellant's contempt

[eight (8) at last count], Appellant forewarned all who would listen and, undoubtedly, some who didn't that the Bankruptcy Court for the District of Columbia did not have ANY authority to punish -- only from the District Court could such sanctions emanate.

But to no avail.

Appellant was arrested and incarcerated on motion for contempt by Appellees above; the United States Trustee and his assistant did nothing to prevent this abominable act; the bankruptcy judge found the Appellant in contempt and signed the order for the arrest and incarceration; the Clerk of the Bankruptcy Court delivered that order to the United States Marshal for execution; and the dirty deed was done.

All of the Appellees knew that the bankruptcy court for the District of Columbia was acting with a "clear absence

of all jurisdiction" for contempt.

14. Appellees in this matter, lastly, clasp to Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096 (9th Cir. 1986) in that "this dispute arises out of a bankruptcy proceeding" and should, therefore, be resolved in the bankruptcy court.

Lonneker will not suffice, though, as Appellant's complaint deals with complicity in perpetrating a contempt action by a non-Article III judge in the "clear absence of All jurisdiction" with the chilling effect of violating one of Appellant's most basic of Constitutional rights -- denial of due process.

Respectively submitted,
/s/ Shirley M. Kearing
Shirley M. Kearing, Appellant

FILED APRIL 26, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING Appellant,	)	
v.	)	No. 90-5062
	)	(C.A. No. 89-2837
THE HONORABLE S. MARTIN TEEL JR., et al., Appellees.	)	

MOTION FOR SUMMARY AFFIRMANCE

Appellees John W. Guinee, Jr., a bankruptcy trustee, and his counsel, Peter R. Kolker, Renee Franklin Hill, and Zuckerman, Spaeder, Goldstein, Taylor & Kolker, respectfully move, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and General Rule 7(i), for summary affirmance of District Judge Gerhard A. Gesell's February 13, 1990 order dismissing this action with prejudice (attached hereto as Exhibit A). The merits of this case "are so clear as to justify

expedited action," Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980), and further briefing and argument are not necessary to a just disposition of this appeal, United States v. Glover, 731 F.2d 41, 44 (D.C. Cir. 1984).

Statement of the Case

This action for $34 million arises out of appellant's arrest and incarceration (of less than one hour) by federal marshals acting pursuant to a facially valid court order. In 1986, appellant and her husband, Dr. Leon Kearing, filed a voluntary petition under Chapter 11 of the Bankruptcy Code, but as debtors-in-possession were unable to formulate a successful plan of reorganization or otherwise dispose of the bankruptcy. Accordingly, on December 15, 1987, United States Bankruptcy Judge S. Martin Teel, Jr. appointed appellee Guinee

as Trustee of the Kearings' bankruptcy estate and thereafter approved the appointment of appellees Kolker, Hill and Zuckerman, Spaeder as counsel for the Trustee.

In discharge of his duties as Trustee, Guinee sought to enlist the cooperation of the debtors in the administration of the bankruptcy estate. When that cooperation was not forthcoming, the Trustee filed a motion seeking, and the Bankruptcy Court granted, an order directing the debtors to assist the Trustee by providing him certain financial information and by not impeding his efforts to sell the debtors' residence on Van Ness Street, N.W. The Kearings did not comply, however, and on May 19, 1988 the Trustee, through his counsel, filed a motion for an order requiring the debtors to show cause why they should not be held in contempt. The Bankruptcy Court granted

this motion, and following a hearing on September 20, 1988 held the appellant in civil contempt, issuing a contempt order on September 30, 1988.

The contempt order required appellant to surrender to the United States Marshal within ten days of service of the Order or be arrested and incarcerated until she cooperated with the Trustee. In an order signed October 14, 1988 but not served by the Clerk until it was mailed to the parties on October 17, 1988, Judge Teel extended appellant's time to file objections to the Contempt Order until October 24, 2988. The U.S. Marshal, unaware that appellant's time to file objections had been extended by Judge Teel (because the contempt order had not been mailed) and acting pursuant to the contempt order, arrested Mrs. Kearing on October 14, 1988. Thereafter, Mrs. Kearing was

incarcerated for a period of less than one hour, whereupon Judge Teel, having been informed of appellant's detention, issued an order releasing her from custody.

The contempt order was eventually appealed to the District Court in connection with other matters, and on August 2, 1989 District Judge Jackson dismissed Mrs. Kearing's appeal in that proceeding. Nevertheless, appellant adhered to her strict refusal to cooperate with the Trustee, and on October 3, 1989 a second motion for a show cause order was filed by the Trustee through his counsel. Appellant filed this pro se action on October 16, 1989 -- more than a year following her arrest on the initial contempt citation and about ten days after the initiation of the second contempt

proceeding.[1]

In her amended complaint, a copy of which is attached hereto as Exhibit B, appellant alleged that appellees, "through malfeasance, misfeasance and nonfeasance of duty," caused "a tortious act" and violated appellant's due process rights by "consummating an illegal arrest and incarceration." As the District Court stated below, however, appellant's complaint failed to "explain how the

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[1] The second contempt proceeding was transferred to the District Court, Misc. No. 89-224. On October 6, 1989, a preliminary hearing was held on the matter, and on October 31, 1989 a second contempt order was entered against the Kearings. As the federal appellees have noted in their motion for summary affirmance of Judge Gesell's order (at footnote 1), "[i]t is a fair inference that appellant filed this action to harass the ... appellees shortly after she learned of a second contempt order (and more than a year after the original contempt order)." Under such circumstances, this appeal should not be permitted to absorb judicial resources or to distract the litigants from other matters.

various defendants were involved in the [alleged] due process violation." Mem. Op. at 2.

The District Court dismissed appellant's amended complaint for failure to state a claim upon which relief may be granted, concluding (1) that appellant's amended complaint, to the extent it alleged negligent conduct by appellees, did not set forth a constitutional violation, Mem. Op. at 3 ("[a]rrest or imprisonment resulting from negligence does not amount to a constitutional tort") (citing Baker v. McCollan, 443 U.S. 137 (1979), and (2) that even if construed as alleging deliberate misconduct on the part of appellees, appellant's amended complaint failed to state a claim under either 42 U.S.C. § 1983 or Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Id.

Legal Argument

For the reasons set forth in Judge Gesell's opinion, and for others not addressed by the District Court, this Court should summarily affirm the judgment below.

First, as the District Court acknowledged, Mem. Op. at 3, to the extent appellant purports to state a constitutional due process claim based on appellees' negligence in causing or contributing to appellant's arrest and incarceration, that claim must necessarily fail because appellant concededly was arrested pursuant to a facially valid court order. The Supreme Court has held specifically that no constitutional claim arises from arrest and subsequent incarceration pursuant to a facially valid court order. Baker v. McCollan, 443 U.S. 137 (1979) (arrest and eight-day imprisonment of wrong person not actionable

under 42 U.S.C. § 1983); see also Sami v. United States, 617 F.2d 755, 773 (D.C. Cir. 1979) ("it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation, despite the loss of liberty that may be involved"); Simons v. Clemons, 752 F.2d 1053, 1055 (5th Cir. 1985). There can be no "deprivation" of constitutional rights within the meaning of the Due Process Clause where the challenged conduct is merely negligent. Daniels v. Williams, 474 U.S. 327 (1986).

Second, even if appellant's amended complaint could be construed as alleging deliberate misconduct by appellees,[2] the District Court was correct in concluding

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[2] Although appellant has alleged "malfeasance, misfeasance and nonfeasance of duty" on the part of appellees, the amended complaint contains no allegation of knowing, intentional, deliberate, malicious or conspiratorial conduct by any party.

that such an allegation would not be sufficient to state a claim under 42 U.S.C. § 1983. Appellant complains of an arrest executed by federal marshals acting pursuant to the order of a federal judge presiding over a federal bankruptcy proceeding. Appellant does not allege the act of any state actor, and actions under 42 U.S.C. § 1983 must plead the conduct of state -- not federal -- actors. See Daly-Murphy v. Winston, 837 F.2d 348 (9th Cir. 1987) ('Section 1983 provides a remedy only for deprivation of constitutional rights by a person acting under color of law of any state or territory or the District of Columbia"); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980); cert. denied, 451 U.S. 983 (1981); Lonneker Farms, Inc. v. Klobucker, 804 F.2d 1096, 1097 (9th Cir. 1986).

Third, appellant fares no better with

respect to a Bivens claim, which she does not explicitly plead in her complaint. As noted by the District Court, Mem. Op. at 4, in filing a contempt motion against appellant, the Trustee and his counsel are not federal actors and cannot be said to have acted under color of law, an essential element of any Bivens claim. See Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); United States v. Price, 383 U.S. 787, 794 (1966); Reuber v. United States, 750 F.2d 1039, 1054 (D.C. Cir. 1984). Mere participation by a party in litigation, without more, does not constitute state (or federal) action. Dennis, 449 U.S. at 28; see also Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980); Sykes v. California, 497 F.2d 197, 202 and n.3 (9th Cir. 1974).[3]

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[3] The Ninth Circuit's opinion in Sykes is particularly relevant to this case. The court rejected a plaintiff's argument that a trustee in bankruptcy had acted under color of law in initiating

Moreover, Guinee's status as a private actor for purposes of Bivens is shared by his counsel, appellees Kolker, Hill and Zuckerman, Spaeder. "[T]he conduct of an attorney acting in his professional capacity while representing his client" does not, standing along, "constitute action under color of law for purposes of [Bivens]." Donlan v. Smith, 662 F. Supp. 352, 360 (D. Md. 1986), aff'd without op., 826 F.2d 1219 (4th Cir. 1987); see also McCord v. Bailey, 636 F.2d 606, 613 (D.C.

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litigation against plaintiff in a related bankruptcy proceeding. 497 F.2d at 202. In so ruling, the court noted that "a private person who makes representations to a state official, even in a report required by law, is not acting 'under color of law' within the meaning of the Civil Rights Statutes." Id. at 202 n.3. Here, Guinee's contempt motion, besides being entirely consistent with his statutory duties, no more "imbued [Guinee] with the power and prestige of government officials," Reuber, 750 F.2d at 1054, than did his counterpart's action in Sykes. Rather, Guinee availed himself of a presumptively neutral procedure presided over by a presumptively neutral judge.

Cir. 1980) ("In their capacities as representatives of a client in court, private counsel do not act under color of state law"). Indeed, this rule obtains even where, as here, the attorney is appointed or approved by the court. Holsey v. Chandler, 598 F. Supp. 368, 370 (D.D.C. 1984) (citing Polk County v. Dodson, 454 U.S. 312 (1981). Thus, the District Court was correct in holding that none of the non-federal appellees acted under color of law for purposes of appellant's Bivens claim and, accordingly, that such claim should be dismissed as a matter of law.

Fourth, the District Court correctly held that appellant's Bivens claim was subject to dismissal for failure to meet the "heightened pleading standard" applicable to all Bivens actions. Mem. Op. at 4-5; see, e.g., Whiteacre v. Davey, 890 F.2d 1168, 1170-72 (D.C. Cir. 1989).

Appellant's amended complaint fails even to allege any specific act or omission of any particular appellee, much less set forth the detailed factual allegations necessary to state a claim of constitutional deprivation. Indeed:

> examination of the complaint ... reveals a series of broad conclusionary statements unsupported ... by specific allegations of fact. In addition, the individual defendants are nowhere referred to in the pleadings, other than in the title to the action, and there is, consequently, no way of determining which defendant, if any, is being charged with responsibility for a particular grievance.

Jackson v. Nelson, 405 F.2d 872, 873-74 (9th Cir. 1968) (affirming dismissal of pro se civil rights complaint).

Fifth, a bankruptcy trustee and his counsel, although not federal actors, are immune from civil liability for their conduct in connection with appellant's arrest and incarceration. Judges are absolutely immune from suits for damages

for acts performed in the discharge of their official duties, provided such acts are judicial in nature and not carried out "in the clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). This absolute immunity extends to persons whose duties and functions constitute an essential part of the judicial process, including bankruptcy trustees, e.g., New Alaska Development Corp. v. Guetschow, 869 F.2d 1298, 1302-03 (9th Cir. 1989); Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986); Howard v. Leonard, 101 B.R. 421 (D. N.J. 1989); Wickstrom v. Ebert, 585 F. Supp. 924, 934 (E.D. Wis. 1984); see also Boullion v. McClanahan, 639 F.2d 213, 214 (5th Cir. 1981).[4] The immunity extends

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[4] Although it is unquestioned that a trustee has immunity "only if his actions are within the scope of the authority conferred upon him by statute or the court," In re Jacksen, 105 B.R. 542, 545

also to a trustee's counsel. Smallwood v. United States, 358 F. Supp. 398, 404 (E.D. Mo) ("the doctrine of judicial immunity also applies to defendant ... as court-approved attorney for the Trustee in

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(9th Cir. Bank. App. Panel 1989) (quoting In re Tucker Freight Lines, Inc., 62 B.R. 213, 217 (W.D. Mich. 1986), the District Court's suggestion (at footnote 1 of its opinion) that actions taken by a trustee as a party to litigation are not immunized from suit is not correct. Indeed, the case cited by the District Court in support of that proposition, Mullis v. United States Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1980), indicates that acts undertaken by a trustee in the contest of litigation are immunized from suit to the same extent as a trustee's other conduct on behalf of the estate. In Mullis, a debtor sued the trustee of his bankruptcy estate, alleging, among other things, that the trustee had violated his constitutional rights by filing a motion seeking the appointment of a guardian ad litem for the debtor and by communicating ex parte [sic] with the bankruptcy judge regarding the trustee's motion against the debtor for fees in connection with the trustee's deposition. Concluding that each of these acts was "within the ambit of the trustee's official duties," the court upheld the dismissal of the debtor's complaint on grounds of immunity. Id. at 1390-91.

Bankruptcy"), aff'd, 486 F.2d 1407 (8th Cir. 1973).[5] "A trustee will enjoy absolute immunity so long as he does not act in the clear absence of all jurisdiction or at least acts under the supervision of the bankruptcy judge." Howard v. Leonard, 101 B.R. 421, 423 (D. N.J. 1989) (citations omitted).

Here, (1) the trustee and his counsel were appointed pursuant to express statutory authority, (2) the acts undertaken by or on behalf of the trustee were at all times consistent with the trustee's statutory obligations and responsibilities, and (3) the order to arrest appellant for contempt -- the sole event from which this claim arises -- was a purely judicial act of Judge Teel.

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[5] It is not inconsistent to say that a bankruptcy trustee or his counsel have immunity derived from a judge's immunity and yet are not themselves federal actors for purposes of a Bivens analysis.

Nevertheless, appellant has contended below, and presumably will argue before this Court, that Judge Teel, allegedly lacking the statutory and/or constitutional power to hold appellant in contempt, acted "in the clear absence of all jurisdiction," thereby defeating his (and movants') defense of absolute immunity from suit for damages.

However, as the federal appellees have argued (at page 5 through 7 of their motion for summary affirmance), Judge Teel had subject matter jurisdiction over appellant's bankruptcy proceeding and was authorized by the 1987 amendments to Bankruptcy Rule 9020 to act precisely as he did in issuing the Contempt Order. Under such circumstances, it cannot reasonably be said that Judge Teel acted in the "clear absence of all jurisdiction." See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978)

(judge who issued ex parte [sic] order to sterilize teenage girl immune from subsequent civil rights suit because act is not in clear absence of all jurisdiction merely because jurisdiction is exceeded or erroneous); O'Neil v. City of Lake Oswego, 642 F.2d 367 (9th Cir. 1981) (pro tem [sic] municipal judge acted in excess of jurisdiction, but not in its absence, when ordering contempt and incarceration despite absence of "the requisite papers to confer jurisdiction"); Ross v. Arnold, 575 F. Supp. 1494 (E.D. Wis. 1983) (family court commissioner erroneously ordered party in divorce proceeding to be jailed; held absolutely immune because he had subject matter jurisdiction in the underlying divorce proceeding and at most acted "in excess" of that jurisdiction). Whatever the niceties of a bankruptcy judge's jurisdiction may be, Judge Teel clearly had

jurisdiction over the subject matter of the proceedings before him, regardless of his power to issue a contempt order.

Conclusion

Inappropriate civil rights suits by bankruptcy debtors against those involved in pending bankruptcy proceedings are routinely dismissed. E.g., Mullis v. United States Bankruptcy Court for the District of Columbia, 828 F.2d 1385 (9th Cir. 1987); Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096 (9th Cir. 1986); see Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980) (civil rights claim arising out of incarceration for contempt). As the Lonneker court noted in language equally applicable to appellant's action:

> This dispute arises out of a bankruptcy proceeding. The issues raised by [the debtor/plaintiff] should be resolved through such proceedings. It constitutes a waste of professional and judicial resources to divert such resources from the bankruptcy proceedings to a

> weak attempt to plead a claim under the civil rights statutes.

804 F.2d at 1097.

For these reasons, and for the reasons set forth above, this Court should summarily affirm the order of the District Court dismissing appellant's action with prejudice.

Respectfully submitted,

/s/ Michael R. Smith

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Dated: April 26, 1990

FILED APRIL 19, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING Plaintiff,	)	
v.	)	Civil Action No. 89-293-GAG
THE HONORABLE S. MARTIN TEEL JR., et al., Defendants	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS TEEL, BLOOM, EARLY, WATES, RUTHERFORD, NEELY, KERR, AND LINK TO DISMISS

Plaintiff has amended her complaint to name four persons from the U.S. Marshals Office for the District of Columbia: (1) Herbert M. Rutherford, III, (2) Joann Neely, (3) Victor Kerr and (3) [sic] Daniel Link (hereinafter "newly named defendants") as defendants in this action. Despite the fact that defendants motion to dismiss plaintiff's first complaint sets forth numerous procedural deficiencies in plaintiff's initial pleadings, plaintiff's amended complaint makes no effort to cure

any of these deficiencies. Instead, plaintiff has merely named additional defendants and requests more monetary damages.[6]

Therefore, for the reasons stated in defendants' original motion to dismiss and for the reasons stated below, this action should be dismissed with prejudice against all defendants represented by undersigned counsel.

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO SATISFY THE STANDARD OF A PLEADING APPLICABLE TO BIVENS CASES

Based on the principles articulated in defendant's original motion for summary judgment, the amended complaint should be dismissed against the newly named defendants because the plaintiff has (1) failed to effect service of process on the

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[6] This is a further indication that this action is merely designed to harass the federal officials named in this action

newly named defendants.[7] (2) incorrectly relies upon respondeat superior liability for defendant Rutherford[8], (3) failed to

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[7] Plaintiff's certificate of service to her amended complaint acknowledges that she sent the papers by mail and therefore failed to personally serve any of the defendants as required by Fed. R. Civ. P. 4(d)(1). It can hardly be claimed that plaintiff's status as a pro se litigant should have any bearing on her knowledge of the procedural requirements since defendant's original motion clearly set forth that plaintiff's obligation to personally serve a copy of the summons and complaint on each and every defendant. Thus, all claims against the newly named defendants must be dismissed for insufficiency of process and insufficiency of service of process. Fed. R. Civ. P. 12(b)(4), (5).

[8] The claim against defendant Herbert M. Rutherford, III, appears to be based exclusively on a respondeat superior theory. His only connection to this action is his position as the United States Marshal for the District of Columbia. Plaintiff has not claimed that he was in any way involved with the alleged "false arrest." Thus, for the reasons set forth in defendant's original motion, at 6, all of the constitutional tort claims against Rutherford should be dismissed for failure to states [sic] a claim upon which relief can be granted.

meet the heightened pleading standard[9], and (4) failed to state a Bivens claim.[10]

II. PLAINTIFF'S CLAIM AGAINST THE NEWLY NAMED DEFENDANTS IS BARRED BY ABSOLUTE JUDICIAL IMMUNITY

As the Supreme Court has observed, "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."

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[9] Despite the fact that defendants original motion sets forth plaintiffs obligation to state with particularity "who did what to whom and why," plaintiff's amended complaint fails to meet the heightened pleading requirement applicable to all Bivens actions. Thus, for the reasons specified in defendants' original motion, at 6-8, all claims against the newly named defendants should be dismissed for failure to meet the heightened pleading requirement.

[10] Plaintiff's amended complaint raises no new issues; it merely realleges a blanket assertion of "false arrest." Thus, once again plaintiff has failed to allege the requisite allegations of a Bivens action since the conduct complained of does not give rise to a constitutional deprivation. See, Defendants' Original Motion, at 8-9.

Pierson v. Ray, 386 U.S. 547, 553-554 (1967). By 1872, the doctrine of absolute judicial immunity for judicial officers was firmly entrenched in American law. See Bradley v. Fisher, 13 Wall. 335 (1872).

The Supreme Court has gone on to extend "absolute immunity to certain others who perform functions closely associated with the judicial process." Cleavinger v. Saxner 474 U.S. 193, 200 (1985). The same judicial immunity held by judges has been extended to other individuals who engage functions integrally related to the judicial process. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 423-424 (1976) (prosecutors); Briscoe v. Lahue, 460 U.S. 32, 335 [sic] (1983) (police officers who testify as witnesses); Cok v. Consentino, 876 F.2d 1, 3 (1st Cir. 1985) (court-appointed guardians ad litem and conservators); Ashbrook v. Holliman, 617

F.2d 474, 477 (7th Cir. 1980) (court-appointed partition sales commissioners); Spaulding v. Nielson, 599 F.2d 728, 729 (5th Cir. 1979) (probation officers who file presentence reports); U.S. Steelworkers of America, AFL-CIO v.Bishop, 598 F.2d 408, 414 (5th Cir. 1979) (marshals who carry out magistrate's orders).

Thus, those who perform duties delegated by the judiciary "are entitled to the same judicial immunity as would be enjoyed by judicial officers performing the same act." Sparks v. Character and Fitness Committee of Kentucky, 818 F.2d 541,45 [sic] (6th Cir. 1987) vacated and remanded 108 S. Ct. 744 (1988), (remanded for reconsideration under Forrester v. White, 108 S. Ct. 538 (1988) affirmed on reconsideration, 859 F.2d 428 (1988) (affirming 818 F.2d 541), cert. denied, 109 S. Ct. 336 (1989). When a marshal carries out the order of a judge,

he is performing a function integrally related to the judicial process. As set forth in 28 U.S.C. § 566(a), "it is the primary role and mission of the United States Marshals Service to provide for the security and to obey [sic] execute, and enforce all orders of the United States District Court ..." [sic] When a marshal carries out a magistrate's order to take an individual into custody, "be it a writ or another form of a written or oral order, the marshal is acting in a purely ministerial role." U.S. v. Persigner, 562 F. Supp. 557, 561 (W.D. Pa. 1982) citing Levy Court of Washington Co. v. Ringgold, 30 U.S. 41 (1831).

Accordingly, the courts have consistently held that the marshals and their deputies have absolute immunity from personal liability suits challenging their compliance with the orders of judicial

officers. See e.g., Steelworkers, 598 F.2d at 414-415; Ross-Bey v. Two Unknown United States Marshals, No. H 87-402, Slip Op. (N.D. Indiana October 27, 1989), at 5-6; Stovall v. Hughs, 580 F. Supp. 97 (W.D. Oklahoma 1983); Martinez v. Winner, 771 F.2d 424 (1984) modified in part on other grounds, and rehearing denied in part, 778 F. 2d 553 (1985), vacated on other grounds, Tyus v. Martines 475 U.S. 1138 (1985); Zimmerman v. Spears 428 F. Supp. 759 (1976), affirmed, 655 F. 2d 310 (5th Cir. 1977). Because the Marshal is acting as a minister of the court, he is "[c]loaked with the absolute immunity of judges." Stovall, 58 F. Supp. at 99.

In this case, it is beyond genuine dispute that the deputies who arrested the plaintiff were acting pursuant to an order of Judge Teel. Judge Teel had full authority to issue the subject contempt

order under Bankruptcy Rule 9020, promulgated by the Supreme Court in 1987 pursuant to 28 U.S.C. § 207. Thus, the newly named defendants are entitled to the same judicial immunity as Judge Teel. See Steelworkers, 598 F.2d at 414-415; Spaulding, 599 F.2d at 729; Cok, 876 F.2d at 3; Sparks, 818 F.2d at 545; Ashbrook, 617 F.2d at 476; Ross-Bey, Slip Op., at 5-6; Stovall, 580 F. Supp. at 99.

III. NEWLY NAMED DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Assuming arguendo that the newly named defendants had exercised discretion in regard to the subject arrest, they would still be entitled to qualified immunity:

> It is now clear that government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of a which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Under Harlow this determination requires an objective, not subjective, analysis. McSurley v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982). Harlow thus places squarely on the plaintiff the burden of showing a "prima face [sic] case of defendants' knowledge of impropriety, actual or constructive." Krohn v. United States, 742 F.2d 24, 31-32 (1st Cir. 1984); Davis v. Scherer, 468 U.S. 183, 191 (1984). Furthermore, as the Supreme Court has more recently held,

> Unless the plaintiff's allegations states [sic] a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.

Mitchcell v. Forsyth, 472 U.S. 511, 526 (1985).

The paramount point to keep in mind in analyzing claims such as the plaintiff's, therefore, is that neither the Court nor the plaintiff can engage in an inquiry into

the state of mind of defendant in resolving the 'threshold" resolution of qualified immunity claims. Harlow, 457 U.S. at 818. Subjective inquiries are legally irrelevant. The only inquiry of any import is whether the defendants' alleged actions violated clearly established law or were objectively unreasonable.

Furthermore, as the Supreme Court and the Court of Appeals have recently explained,

> [t]he contours of the right [the official is alleged to have violated] must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.

Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987); Martin v. Malhoyt, 830 F.2d at 253.

Thus, the Supreme Court held in Anderson that even though plaintiff's Fourth Amendment rights were violated in that case, the defendant officers were entitled to assert and obtain qualified immunity

from suit individually if they could show they acted reasonably. As the Supreme Court explained in another case, qualified immunity protects from suit "all but the plainly incompetent or those who knowingly violate the law." Briggs v. Malley, 475 U.S. 335, 341 (1986).

Here, it is clear that the marshals acted reasonably in executing Judge Teel's order. The statute governing the U.S. Marshal's duties and powers, 28 U.S.C. § 566(a) tells the U.S. Marshals that their primary duty is to "[o]bey, execute and enforce all orders of the United States District Court." In addition, as noted by the Ninth Circuit in McQuade v. United States, 839 F2d [sic] 640, 643 (9th Cir. 1988), the caselaw establishes that a marshal's duty is to obey judicial orders, not to question their validity:

> [plaintiff argues] that the Marshal and the Bureau did not exercise due

> care in the conduct of their duties by failing to question the validity of the court order under which he was detained. We disagree. The Marshall and the Bureau owed no duty to [plaintiff] to question the validity of the court order. See Whirl v. Kern, 407 F.2d 781, 791 (5th Cir. 1969) ("a jailer cannot be held liable for errors in a warrant of commitment fair and valid on its face"), cert denied, 396 U.S. 901 (1969); Francis v. Lyman, 216 F.2d 583, 585 (1st Cir. 1954) (Correctional officers had "neither the legal duty nor legal authority ... to go behind ... [a] judicial order of commitment to inquire into [its] validity"; Zuranski v. Anderson, 582 F. Supp. 101, 109 (N.D. Ind. 1984) ("[t]o require the sheriff or warden to investigate each order of commitment by a judge and to independently determine if the sentence was legally imposed would be absurd").

Thus, it is clear that the Marshals acted reasonably and are entitled to qualified immunity.

CONCLUSION

For the forgoing [sic] reasons, all claims against the newly named defendants should be dismissed with prejudice. In addition, for the reasons articulated in

defendants' first motion for summary judgment, all claims against the remaining defendants represented by the undersigned counsel should be dismissed.

Respectfully submitted,

/s/ Jay B. Stephens
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United States Attorney

/s/ John D. Bates
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Assistant United States Attorney

/s/ Michael T. Ambrosino
MICHAEL T. AMBROSINO
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FILED APRIL 19, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING Plaintiff,	)	
v.	)	Civil Action No. 89-293-GAG
THE HONORABLE S. MARTIN TEEL JR., et al., Defendants	)	

MOTION OF DEFENDANTS TEEL, BLOOM, EARLY, WAITES, RUTHERFORD, NEELY, KERR AND LINK TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants Judge Teel, Martin Bloom, Dennis Early, John Waites, Herbert Rutherford, Joann Neely, Victor Kerr and Daniel Link, through their undersigned counsel, move pursuant to Fed.R. Civ. P. 12 to dismiss plaintiff's first amended complaint. At the time plaintiff filed her amended complaint, motions to dismiss plaintiff's original complaint had been filed on behalf of defendants Judge Teel, Martin Bloom, Dennis Early and John Waites.

So far as those defendants are concerned, the amended complaint raises the same legal issues that the original complaint raised. Accordingly, pursuant to Fed. R. Civ. P. 10, we hereby incorporate by reference our original motion to dismiss and the memorandum in support thereof and request that all claims against defendants Judge Teel, Martin Bloom, Dennis Early, and John Waites be dismissed.

Although the amended complaint names four new defendants (Rutherford, Neely, Kerr and Link), it raises no new legal issues or factual allegations. Thus, defendants, Rutherford, Neely, Kerr and Link therefore move this Court pursuant to Rule 12(b)(1), (4), (5) and (6), Federal Rules of Civil Procedure, to dismiss all claims filed against them individually for lack of jurisdiction over the subject matter, insufficiency of process,

insufficiency of service of process and failure to state a claim upon which relief can be granted. In addition, all of the newly named defendants are immune from suit. We attach a memorandum of points and authorities in support of this motion. For the reasons set forth in defendants original motion to dismiss, memorandum in support thereof and the memorandum attached to this motion, plaintiffs amended complaint should be dismissed, with prejudice.

Respectfully submitted,

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/s/ John D. Bates
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/s/ Michael T. Ambrosino
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FILED APRIL 19, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5062
(C.A. No. 89-2837)

SHIRLEY M. KEARING
Appellant,

v.

THE HONORABLE S. MARTIN TEEL JR., et al.,
Appellees.

FEDERAL APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Federal appellees, the Honorable S. Martin Teel, U.S. Bankruptcy Judge for the District of Columbia, Martin L. Bloom, Clerk of the U.S. Bankruptcy Court for the District of Columbia, John Waites, United States Trustee, Dennis Early, Office of the United States Trustee, Herbert Rutherford, United States Marshal for the District of Columbia, and Joann Neely, Victor Kerr and Daniel Link, Deputy United States Marshals for the District of Columbia, respectfully

move the Court for summary affirmance of the February 13, 1990 order of the Honorable Gerhard A. Gesell, dismissing this action. A copy of the District Court's opinion and order is attached.

Federal appellees submit that the merits of the case are sufficiently clear to justify summary disposition. See, e.g., Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449, U.S. 994 (1980).

I.

This action stems from Mrs. Kearing's allegations of illegal arrest and incarceration by deputy marshals who were acting pursuant to a valid contempt order. Judge Teel found appellant in contempt of court after she had been deliberately uncooperative in an involuntary bankruptcy proceeding. She was instructed to surrender herself to the United States

Marshal or face arrest. Appellant moved for an extension of time in which to file objections to the contempt order. On October 13, 1988, Judge Teel granted her an extension and ordered that she be permitted to file any objections on or before October 24, 1988.

In the interim, the U.S. marshals, without knowledge of the extension of time, arrested appellant at 3:15 p.m. on October 14, 1988. Judge Teel was serving on the bench at the time of the arrest. Upon recess, Judge Teel learned of the arrest and immediately issued an order for appellant's release at 4:02 p.m., less than an hour after her arrest.

Appellant's amended complaint alleged that appellees "through malfeasance, misfeasance and nonfeasance of duty" caused "a tortious act" and violated appellant's due process rights by "consummating an

illegal arrest and incarceration." It failed, however, to explain how the various persons named therein were involved in the alleged due process violation. The District Court held that amended complaint failed to state a claim upon which relief may be granted and failed to state a constitutional tort claim. Mem. Op., at 3. Specifically, the court concluded that no claim existed under 42 U.S.C. § 1983 because the amended complaint failed to allege any action by any person under color of state law. The District Court also found that the amended complaint failed to state a Bivens claim against any of the federal appellees.

The District Court dismissed the claim against Early and Waites for failure to meet the heightened pleading standard since the mere fact that Early was involved in the appointment of the bankruptcy trustee

and Waites was his superior did not amount to an alleged constitutional violation. Id., at 5. Moreover, it held that Judge Teel was entitled to absolute immunity since he was empowered to hold appellant in contempt under Bankruptcy Rule 9020 and therefore did not act in the clear absence of all jurisdiction. Id. The judicial immunity was held to extend to Bloom and the four marshals since their actions were closely associated with the judicial process. Id. Finally, the District Court noted that even if the marshals exercised independent discretion in carrying out the arrest, they would be entitled to qualified immunity under Harlow v. Fitzgerarld, 457 U.S. 800 (1982), because a reasonable person in their situation would not have known that their conduct violated clearly established law and there was no evidence whatsoever to suggest that they knew that

Judge Teel had stayed the contempt order. Id., at 5-6.

Based on these findings, the District Court dismissed this case with prejudice. This appeal followed.

II.

The District Court correctly held that appellant failed to meet the heightened pleading standard. This Court has explained on several occasions that Bivens plaintiffs are held to a "heightened pleading standard" which requires them "at the very least [to] specify the ±clearly established' rights they allege to have been violated with ... precision." Martin v.Malhoyt, 830 F.2d 237, 253 (D.C. Cir. 1987), quoting Smith v. Nixon, 807 F.2d 197, 200 (D.C. Cir. 1986), and Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985). This heightened pleading standard is applicable

to all Bivens cases, no matter what allegations are made. See Siegert v. Gilley, 895 F.2d 797 (D.C. Cir. 1990), Whiteacre v. Davey, 890 F.2d 1168 (D.C. Cir. 1989); Martin v. Malhoyt, 830 F.2d at 253 and n.40. See also Hobson, supra, 737 F.2d at 29-31; Martin v. D. C. Metropolitan Police Dept., 812 F. 2d 1425, 1435-36 (D.C. Cir. 1987), vacated in part, 817 F.2d 144 (D.C. Cir. 1987), vacated part reinstated, 824 F.2d 1240, 1246 (D.C. Cir. 1987). It requires the plaintiff to state facts with particularity in the complaint that demonstrate "who did what to whom and why." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983). See also Rochon v. FBI, 691 F. Supp. 1548 (D.D.C. 1988). Thus, as this Court explained in the conspiracy setting,

> [u]nsupported factual allegations which fail to specify in detail the factual

> basis necessary to enable [defendants] to intelligently prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive [plaintiff] of [her] constitutional rights.

Martin v. Malhoyt, 830 F.2d at 257.

As noted by the District Court, appellant's amended complaint utterly fails to allege any specific act or omission of any specific appellee. Mem. Op. at 2. It merely draws broad legal conclusions including the allegation that her arrest was illegal. Thus, the District Court properly held that these allegations were clearly insufficient to meet the heightened pleading requirement and the claims against Early and Waites were properly dismissed on that basis.

Moreover, the District Court properly found that the amended complaint failed to state a claim upon which relief can be granted since the conduct complained of does not give rise to a constitutional

deprivation. See, e.g., Reuber v. United States, 750 F.2d 1039, 1054 (D.C. Cir. 1984). As noted by this Court in Sami v. United States, 617 F.2d 755, 773 (D.C. Cir. 1981), "it takes more than a false arrest or malicious prosecution to rise to the dignity of a constitutional violation, despite the loss of liberty that may be involved." Similarly, the Supreme Court in Baker v. McCollan, 443 U.S. 137 (1979), held that the mistaken arrest and eight-day imprisonment of the plaintiff in that case was not a constitutional violation. Thus, appellant's detention for less than an hour in this case certainly falls short of stating a constitutional violation.

Furthermore, the District Court properly held that appellant's claims against Judge Teel, Bloom and the four marshals are barred by absolute judicial immunity. Mem. Op., at 5. It is well established that

Judges are absolutely immune from civil liability for damages for their judicial acts. Bradley v. Fisher, 13 Wall. 335, 347 (1872). The broad application of this principle was summarized by the Supreme Court in Stump v. Sparkman, 435 U.S. 349, 356-57 (1978):

> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

In that case, the Supreme Court distinguished between an act in the clear absence of jurisdiction and an act in excess of jurisdiction:

> [I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would jurisdiction and would be immune. Stump, 435 U.S. at 357 n.7, citing Bradley, 13 Wall., at 352.

Since Judge Teel clearly had subject matter jurisdiction over the bankruptcy proceedings and was empowered under Bankruptcy Rule 9020 to hold appellant in contempt, he has absolute immunity from suit. See O'Neil v. City of Lake Oswego, 642 F.2d 367, 369 (9th Cir. 1981) (Judge who convicted defendant for contempt, an act within the court's jurisdiction, but without the affidavit required by statute to confer jurisdiction over the offense charged, was still entitled to immunity.[11]

Martin Bloom, clerk at the U.S. Bankruptcy Court, and the four U.S.

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[11] It is a fair inference that appellant filed this action to harass the federal appellees shortly after she learned of a second contempt order (and more than a year after the original contempt order). Recently, the Supreme Court reiterated the principle initially stated in Bradley that "judicial immunity also protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." Forrester v. White, 108 S.Ct. 538, 543 (1988).

marshals are also entitled to absolute judicial immunity since the only possible act which they could have allegedly been associated with was the execution of the contempt order. See Scott v. Dixon, 720 F.2d 1542, 1546-47 (11th Cir. 1983), cert. denied, 469 U.S. 832 (1984) (extending absolute judicial immunity to Clerk of State Court of Glynn County, Georgia, who issued an arrest warrant); Panko v. Rodak, 606 F.2d 168, 171 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980) (extending absolute judicial immunity to Clerk and Assistant Clerk of the United States Supreme Court); U.S. Steelworkers of America, AFL-CIO v. Bishop, 598 F.2d 408, 414 (5th Cir. 1979) (absolute immunity applicable to marshals executing magistrate's order.[12] The only remaining

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[12] The District Court properly noted that even if the Court were to assume that the marshals exercised independent

federal appellees, Dennis Early and John Waites, had absolutely no involvement in the issuance or the execution of the contempt order and were clearly improper parties to this action.

Finally, since the act complained of was carried out by federal officials acting under color of federal law, the district court properly rejected appellant's claim under 42 U.S.C. § 1983. The only act mentioned in the amended complaint involved an arrest pursuant to a federal contempt order, issued by a federal Judge and executed by federal marshals. Accordingly, there is no valid basis for a claim under section 1983, in that appellant's

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discretion in carrying out the arrest, they were nevertheless entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 8090 (1982), "because a reasonable person in their situation would not have known that their conduct violated clearly established law." Mem. Op., at 6. See also Anderson v. Creighton, 107 S.Ct. 3034 (1987).

allegations are against federal officials acting under color of federal law:

> Section 1983 provides a remedy only for deprivation of constitutional rights by a person acting under color of law of any state or territory or the District of Columbia.

Dale-Murphy v. Winston, 837 F.2d 348 (9th Cir. 1987).

III.

For all of the foregoing reasons, the federal appellees respectfully submit that the judgment of the District Court should be summarily affirmed.

/s/ Jay B. Stephens
JAY B. STEPHENS
United States Attorney

/s/ John D. Bates
JOHN D. BATES
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/s/ R. Craig Lawrence
R. CRAIG LAWRENCE
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/s/ Michael T. Ambrosino
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FILED JANUARY 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	File No. 89-7211
Movants, Pro Se	)	
	)	
Debtors, Pro Se	)	Bankruptcy Case
	)	No. 86-00913
	)	(Chapter 11)
	)	
Appellants, Pro Se	)	District Court
	)	Appeal Case
	)	No. 88-1232 TPJ

BRIEF

The Kearings feel that this bankruptcy proceeding has become such a "travesty of justice" that even some of the best legal minds in bankruptcy practice throughout this country, as well as themselves, are totally appalled at the gross irregularities.

The bankruptcy process is a structured field -- basically administrative -- governed by statutory law with definitive restrictions placed upon all the

participants.

This proceeding has become such a glaring example of "inside players making up the rules as they go along" that only the myopic would be remiss to encounter the utter contempt and disregard these "players" have had of the Kearings' right to "due process" under the law as guaranteed by Amendment V of the United States Constitution.

The financial difficulties for the Kearings began in early 1986 after they had increased secured loans on their real property, incurred excessive consumer debt and made an imprudent investment in three (3) condominium units at the Hastings Condominium located at 4444 Connecticut Ave, N.W., Washington, D. C.

On November 6, 1986, the Kearings became co-plaintiffs in a multi-plaintiff action in the Superior Court for the District of

Columbia, entitled Hastings Condominium Association, Inc., v. National Bank of Washington, et al [CA 09219-86], of which Standard Federal Savings & Loan Association, now known as Standard Federal Savings Bank, was alleged, among other things, of being a major participant in the development, marketing and financing of the Hastings Condominium.

The complaint in this litigation contains 18 causes of action under the following categories:

(1) negligence and negligent misrepresentation;
(2) actual common law fraud;
(3) constructive common law fraud;
(4) breach of contract;
(5) breach of express warranties;
(6) breach of implied warranties;
(7) breach of warranty contained in D. C. Condominium Act of 1976;
(8) breach of fiduciary duty;
(9) negligent construction;
(10) violation of D. C. Consumer Protection Procedures Act of 1976;
(11) violation of D. C. Condominium Act of 1976; and,
(12) civil conspiracy to violate D. C. law.

The complaint seeks actual damages of $5,000,000.00 and punitive damages of $5,000,000.00; and recision of the underlying purchase contracts, with a full refund of the purchase price for each condominium unit plus interest.

On or about November 18, 1986, the Kearings employed, by written agreement, an attorney, Alfred Lawrence Toombs, Esq., for legal advice and representation ONLY in a Chapter 13 [adjustment of debts of an individual with regular income] bankruptcy proceeding under 11 U.S.C.

This attorney was paid a $2,500.00 cash retainer and the Kearings agreed to an hourly rate of $125.00 thereafter, plus expenses. The retaining fee was paid by one Doug Smith who had held an escrow account on the Kearings' condominium units.

At attorney Toombs' insistence the Kearings made bi-weekly payments of $700.00

to him until they had paid over $7,500.00 beyond the original retainer - all the while neglecting their other outstanding personal financial responsibilities such as utilities, doctor bills, automobile upkeep and other household expenses.

On December 10, 1986, attorney Toombs, upon a more thorough investigation of the Kearings' financial records, discovered that the Kearings were ineligible to enter into a Chapter 13 and proceeded to file [and personally pay the filing fee], without consent or written authorization from the Kearings, a voluntary petition in the Bankruptcy Court for the District of Columbia for relief under Chapter 11, Reorganization, of 11 U.S.C. and not Chapter 13, the so-called "wage earner plan" as had been agreed upon.

Assets of approximately $1,166,327.00 were listed which included the Kearings'

equity in five (5) real estate properties totaling approximately $161,000.00:

(1) 6612 Millwood Road, Bethesda, Maryland 20817;
(2) 4444 Connecticut Avenue, N. W., Condominium Unit 201 (the "Hastings"), Washington, D. C. 20008
(3) 4444 Connecticut Avenue, N. W., Condominium Unit 502 (the "Hastings"), Washington, D. C. 20008
(4) 4444 Connecticut Avenue, N. W., Condominium Unit 504 (the "Hastings"), Washington, D. C. 20008; and
(5) 4801 Van Ness Street, N. W., Washington, D. C. 20016.

The Kearings' total approximate liabilities were $902,345.00, leaving them a net worth of almost $265,000.00 -- a far cry from insolvency. The Kearings remained debtors-in-possession of their estate.

"Exhibit B" of the Kearings' petition was never signed or filed by attorney Toombs as required by Section 322 of Pub.L. 98-353, July 10, 1984, and Section 283(aa) of Pub.L. 99-554, October 27, 1986; both mandate that counsel certify that a full

explanation of the relief available to "consumer" debtors under 11 U.S.C. has been given. Whether or not this was intentional pales to the fact that the Kearings, themselves, were never told by attorney Toombs about any chapter proceedings in bankruptcy.

And by his failure to sign "Exhibit B," attorney Toombs defeated the specific requirements under Rule 9011 of the Rules of Bankruptcy Procedure and Rule 11 of the Rules of Federal Civil Procedure which both state:

> a signature constitutes a certificate by him [the attorney] that ... it is well grounded in fact and is warranted by existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay or to increase the cost of litigation.

Rule 9011 continues:

> Every petition ... filed in a case under the Code on behalf of a party represented by an attorney ... shall be signed by at least one attorney of record in his individual name.

If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required.

Rule 11 states:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney ....

If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

Regardless, on and after December 10, 1986, no attempt, as required by 11 U.S.C. 1102(a)(1), "as soon as practicable after the order for relief ..." was, or has been, made by "the United States Trustee [who] shall appoint a committee of creditors holding unsecured claims ...."

On January 20, 1987, the Kearings filed with the Clerk of the Bankruptcy Court a praecipe for change of address from 4341 Embassy Park Drive, N. W., Washington, D. C. 20016, to their current home address of

4801 Van Ness Street, N. W., Washington, D. C. 20016.

This is of the utmost importance for two reasons:-

(1) No noticing was timely received by the Kearings; and
(2) No change was made by the Clerk of the Bankruptcy Court until so demanded, personally, by the Kearings ALMOST A YEAR LATER in early 1988.

On April 15, 1987, an attorney -- purportedly representing a secured creditor as counsel for Chevy Chase Savings Bank, F.S.B. -- filed a motion to convert the Kearings' Chapter 11, Reorganization, proceeding to a Chapter 7, Liquidation, proceeding, or in the alternative, to appoint a trustee.

There is a grave question as to whether or not this attorney represents a secured creditor and has standing in this bankruptcy proceeding.

The Kearings initiated a mortgage with

B. F. Saul Mortgage Company in September of 1983, and this company is named first mortgagee in the deed as holder of the note; however, through B. F. Saul Mortgage Company this note was sold in the "jumbo" secondary market to Aetna Casualty Company, who in turn then became the first mortgagee.

Chevy Chase Savings Bank, F. S. B., a subsidiary of B. F. Saul Mortgage Company, then became the servicing agent for Aetna; however, they were not "trustee" on the deed as American Security Bank was the deed of trust holder until a Ronald Chasen, of Chasen and Chasen law firm -- at which the above attorney is employed -- recorded himself as a "substitute trustee" on December 8, 1986, recorded January of 1987, and this was after notification by the Kearings attorney that they were, indeed, going to file bankruptcy.

This Court must determine whether or not there is standing for this attorney, who has held himself out at all times in this proceeding not as an agent but a secured creditor, to bring motions of any kind into the Bankruptcy Court.

On April 21, 1987, counsel for Standard Federal Savings Bank, another secured property creditor, filed a motion to lift the automatic stay in order to foreclose on the Kearings' three condominium units at the "Hastings."

On April 28, 1987, notice to creditors was given for the sale of the Kearings' income-producing, rental property located on Millwood Road.

The Bankruptcy Court-ordered, fair market value appraisal of that Millwood property was $290,000.00.

On April 28, 1987, the same day that notice was sent to sell the Millwood Road

property, attorney Toombs filed for an award of interim compensation in the amount of $17,344.00 and reimbursement of expenses of $269.59.

On April 30, 1987, the Kearings submitted a memorandum in opposition to motions of Standard Federal Savings Bank to vacate the automatic stay.

On May 29, 1987, the Bankruptcy Court entered an order allowing and approving the sale of the Millwood Road property at $23,200.00 less than its appraised value.

The net proceeds from the sale were ordered to be held in escrow by attorney Toombs. [Note: Additional income from other rental properties was also being held by attorney Toombs and no accounting or bank statements have ever been filed with the Bankruptcy Court to enable the Kearings, or anyone else for that matter, to determine whether any co-mingling of

funds by attorney Toombs has occurred.]

On July 16, 1987, hearing was held and a continuance was ordered until November 6, 1987, on Standard Federal Savings Bank's lift stay motion of April 21, 1987.

The Bankruptcy Court outlined, at this hearing, an alternative to immediate foreclosure, pending resolution of the litigation in the Superior Court, under which the Kearings could adequately protect Standard Federal Savings Bank by making payment of interest on such sums as "might be expected" to be recovered at foreclosure sales of the units involved, such interest to run beginning August 16, 1987.

On July 17, 1987, counsel for Chevy Chase Savings Bank, F.S.B. filed a praecipe to withdraw, without prejudice, its motion of April 15, 1987, to convert the proceedings to a Chapter 7 proceeding, or in the alternative, appoint a trustee.

On August 10, 1987, a plan of reorganization was filed, classifying claims which provided approximately 26 percent payback on unsecured claims, and the continuance of the suit against Standard Federal Savings & Loan.

A Bankruptcy Court-ordered disclosure statement was to be filed by August 28, 1987.

No disclosure statement has ever been filed.

On September 10, 1987, the Bankruptcy Court entered an order awarding attorney Toombs interim fees in the amount of $23,744.00, including direct payments previously made by the Kearings upon attorney Toombs' insistence totaling $6,400.00.

On September 17, 1987, one week after receiving his first interim fees, attorney Toombs filed an application for a

supplemental award of compensation and reimbursement of expenses in the amount of $20,036.25, reduced by credited direct payments by the Kearings, again induced by attorney Toombs' insistence, of $1,161.23.

On October 6, 1987, the Kearings, pro se, filed a personal plea for intervention by the Bankruptcy Court concerning their case including all these attorney's fees.

This document was presumably forwarded to the Office of the United States Trustee; no one is sure whether or not it was.

The Kearings made provable allegations that their estate was in jeopardy due to the actions of attorney Toombs and requested assistance, inter alia, for the monitoring of compensation and reimbursements filed under 11 U.S.C. 330.

Such monitoring should have already been done by the United States Trustee who is required, pursuant to 28 U.S.C. Section

586(A),(B),(F) and (G), to "monitor plans and disclosure statements, monitor the progress of cases...to prevent undue delay," or "... matters which relate to ... a crime under the laws of the United States ..."

No response, or action, has ever been taken on the Kearings' October 6, 1987, plea for intervention; and it is unknown whether the U.S. Trustee, in fact, ever received this document.

On October 6, 1987, the Kearings, pro se, requested, in writing, a hearing on the application for fees and expenses filed by attorney Toombs on September 17, 1987.

No notice or hearing has occurred.

On October 6, 1987, the Kearings, pro se, filed a request for consent to handle the sale of the Van Ness Street property that attorney Toombs had put up for sale.

No notice, hearing or ruling has ever

occurred on the Kearings' motion.

On October 8, 1987, notice to sell the Van Ness Street property was given by the Bankruptcy Court.

On October 26, 1987, the Kearings, pro se, relieved their attorney Toombs from further representation.

During prior negotiations (still without authorization or consent of the Kearings but before his firing) then attorney Toombs obtained Standard Federal Savings Bank's consent to the interest payment plan outlined above (July 16, 1987), and to which the Kearings were agreeable.

However, previous attorney Toombs, without authorization or consent of the Kearings and after being fired on October 26, 1987, but before a hearing on November 6, 1987, entered into negotiations with Standard Federal Savings Bank for complete disposition of the

Kearings' three "Hastings" condominium units.

On November 3, 1987, attorney Toombs filed application for leave to withdraw as counsel.

On November 4, 1987, the Kearings were sent notice by mail to the Embassy Park Drive address (and contacted by the Clerk of the Bankruptcy Court by telephone on November 4, 1987) of a hearing set two days hence, November 6, 1987, on:

(1) the "application of Alfred Lawrence Toombs, Esq., for leave to withdraw as counsel for debtor [sic] in possession" and response by debtors thereto;
(2) the "request for approval of sale of real property at 4801 Van Ness Street, N. W., Washington, D. C.;" and
(3) the "application by debtor's [sic] counsel for supplemental award of compensation."

On November 6, 1987, the Kearings, pro se, filed a motion in the Bankruptcy Court to deny approval of sale of the Van Ness Street property because "[d]ebtors have not received proper or ethical legal advice."

On November 6, 1987, the Kearings, pro se, filed an application for an expedited hearing for:

(1) removal of attorney Toombs for failure to perform all of the duties of an attorney;
(2) revocation of the order awarding attorney Toombs interim compensation and expenses;
(3) denial of subsequent compensation and expenses to attorney Toombs; and
(4) request for appointment of an examiner under 11 U.S.C. 1104(b)(1).

1104(b)(1) states:

... if the court does not order the appointment of a trustee[,] ... on request of a party in interest ... and after notice and hearing, the court shall order the appointment of an examiner ... [for] investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity ... of the affairs of the debtor ....

This section is consistent with the judicial economy set out in HR 95-595, at page 402, where Congress states in part:

generally a trustee would not be needed ... where the protection ... could equally be afforded by an examiner.

Additionally, an analysis of the costs and benefits of an examiner - paid an

hourly or a flat fee - versus a trustee - who commands a percentage payment for transactions he churns within a debtor's estate - should be made by the Bankruptcy Court.

No notice, hearing or ruling has ever occurred on the Kearings' motion for appointment of an examiner.

On November 6, 1987, the Kearings, pro se, filed a further answer to Standard Federal Savings Bank's lift-stay motion of July 16, 1987, which included that to their knowledge and belief, a recently purchased condominium unit in the "Hastings" building, after deduction for fees and costs, realized a foreclosure price of approximately $90.00 per square foot. Each of the Kearings' condominium units, in foreclosure, then, would be worth about $76,500 net, after expenses of sale if that figure were to be used to calculate the

square footage price.

The Kearings proposed to pay 7 1/2 percent simple interest per annum on that foreclosure price until resolution of pending litigation in Superior Court.

On November 6, 1987, at the hearing, the following events occurred:

(1) The Bankruptcy Court urged the Kearings to retain new counsel; that appearance should be entered on or before December 7, 1987; or absent that, "unless contrary be timely shown," a trustee would be appointed.

(2) The Bankruptcy Court, on its own, requested and allowed an oral motion by counsel for Chevy Chase Savings Bank, F. S. B., for removal of debtors-in-possession and appointment of a trustee even though such counsel had previously withdrawn the same motion on July 17, 1987.

No evidence was presented or testimony given.

Twenty days notice was to be given on such motion.

Notice to the Kearings was sent to the wrong address (Embassy Park Drive) and was received after December 1, 1987.

(3) Standard Federal Savings Bank was instructed to send a twenty day notice along with a proposed settlement order for a "deed in lieu of foreclosure" that previous attorney Toombs and Standard Federal had entered into unbeknownst to the Kearings until this hearing.

(4) Previous attorney Toombs was ordered to fully cooperate with either the Kearings' new counsel or a trustee.

On November 9, 1987, attorney Toombs, as a shield in an attempt to deflect provable allegations by the Kearings for incompetent bankruptcy advice, practice and deceit, filed for a protective order inaccurately alleging the Kearings, in their motion of November 6, 1987, had filed "scandalous or defamatory matter."

On November 25, 1987, the Kearings filed an emergency motion for use of funds of the estate for, among other things, the hiring of new counsel as the Bankruptcy Court had countenanced on November 6, 1987.

No notice or hearing on such emergency motion has ever occurred.

On December 3, 1987, the Bankruptcy Court issued a protective order for previous attorney Toombs under Rule 9018(2) of the Rules of Bankruptcy Procedure.

On December 7, 1987, the Kearings complied with the Bankruptcy Court's mandated deadline, anyway, hiring new counsel and in so doing retained a nephew-in-law, Michael R. Huffstetler, Esq., who agreed to take the case for expenses (no charge for his services). The Kearings also filed an application "for leave to hire attorney and for payment from funds of the estate" to be made to attorney Huffstetler for expenses.

On December 9, 1987 - almost one year to the day from the filing of the order for relief - the Bankruptcy Court ordered the appointment of a trustee, removing the Kearings as debtors in possession for "incompetence," despite the Kearings'

compliance with the Bankruptcy Court's deadline for retention of counsel, and despite the absence of allegations or a hearing regarding competency or any other allegations alluding to nonfeasance, malfeasance or misfeasance by the Kearings.

On December 15, 1987, the United States Trustee appointed John W. Guinee, Jr., as trustee and fixed bond at $50,000.00.

On December 17, 1987, previous attorney Toombs filed a "suggestion of appropriateness of disposition of application of supplemental award of [the] compensation and reimbursement of [the] expenses" which he had initially requested on September 17, 1987.

On December 17, 1987, the appointed trustee, only two days after his appointment, before any qualification criteria was met [Note, too, that he has yet to meet any] and before obtaining or

reading the Kearings' file, stated, in writing, that even though he had only conversed with the former attorney, counsel for one creditor and with one of the Kearings, he intended:

(1) to dispose of some of the real property of the Kearings' estate;
(2) to enter into settlement agreements on other real property;
(3) to submit a plan for full payment of all claims against the estate of the Kearings - a so-called "100% plan" - whether or not the Kearings consented, or even had the ability, to carry out such a plan; and
(4) to approve the application of previous attorney Toombs for compensation.

On December 23, 1987, the Kearings filed for an "emergency application for removal of the Chapter 11 trustee, John W. Guinee, Jr., and for [the] appointment of an examiner" stating, among other things, that two recent major and explicit violations of the Bankruptcy Code had been made, not to mention the allegations of impropriety previously raised in the Kearings' November 6, 1987, filings.

First, the United States Trustee never consulted with any party in interest before appointing the trustee or never received court approval of his appointment as required by 11 U.S.C. 1104(c).

11 U. S. C. 1104(c) states that "the United States Trustee, after consultation with the parties in interest, shall appoint, subject to the court's approval ... [a] trustee."

Second, a number of required procedures were not followed. Rule 2008 of the Rules of Bankruptcy Procedure states that "[t]he clerk shall immediately notify the trustee of his selection, how he may qualify and, if applicable, the amount of the bond. The trustee shall notify the court in writing of the acceptance or rejection of the office within five days after receipt of notice of selection."

11 U. S. C. 322(a) provides that "a

person selected under section ... [11 U.S.C.] 1163 ... qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States ...."

Rule 2010(c) of the Rules of Bankruptcy Procedure states that "a certified copy of the order approving the trustee's bond or of the acceptance filed under subdivision (b) of this rule shall constitute conclusive evidence of qualification."

Subdivision (b) of Rule 2010 states that "a trustee for whom a blanket bond has been filed shall qualify by filing an acceptance of the election or appointment."

None of these procedures was followed.

On December 23, 1987, in "affirmation in support of debtors application for retention of counsel," attorney Huffstetler disclosed that he and his

brother-in-law, a partner in the law firm where attorney Huffstetler is employed, were nephews-in-law of one of the Kearings.

On December 28, 1987, previous attorney Toombs in flagrant and direct violation of Bankruptcy Rule 9003 and Local Rule 106(b), wrote an ex parte letter to the Bankruptcy Judge suggesting that prior to entry of turnover of funds of the Kearings' estate from his escrow account to the appointed trustee, "the Court might limit the turnover order to those funds not subject to the pending fee application. There are presently $28,818.41 in funds ... [P]ending application seeks payment of ... $19,228.48."

On December 29, 1987, previous attorney Toombs, in writing, denied release of any of the Kearings' files, in defiance of the Bankruptcy Court order of November 6, 1987, stating he held an "attorney's retaining

lien" for his claim of post-petition administrative expenses; yet, if adequate security were given, such as "an agreement to consent to my pending and final applications" for compensation, he would release the file.

On January 4, 1988, the Bankruptcy Court entered a final order denying the Kearings' emergency application filed on December 23, 1987, that dismissed all of the Kearings' reasons given for removal of the trustee and appointment of an examiner as "... none ..." being "meritorious."

On January 4, 1988, the Bankruptcy Court denied the Kearings use of any of the funds of the estate as requested on November 25, 1987, delaying this decision for almost two months with full knowledge that the Kearings' income had been temporarily reduced by half from mid-October until December of 1987; and denied, "without

prejudice, debtors right to retain [Mr. Huffstetler as] counsel ... to represent them ... as debtors in possession [although he could represent them as debtors but] ... not to be paid out of assets of their estate."

In its order, the Bankruptcy Court also stated that "contrary to debtors assertion in their application that Mr. Huffstetler is ±not a[n] ... insider' and a ±disinterested person,' that under 11 U.S.C. 101(39) they [sic] are her relatives; therefore insiders as defined by 11 U.S.C. 101(30)(A)(i) and not disinterested persons as defined by 11 U.S.C. 101(13)(A); and hence by the express terms of 11 U.S.C. 327(a), as incorporated by 11 U.S.C. 1107, is prohibited from serving as counsel for these debtors as debtors in possession." However, the Bankruptcy Court must not have read In Re

Covey 57 B.R. 665 (Bkrtcy. D SD 1986); In Re O'Connor, 52 B.R. 892 (Bkrtcy. WD OK 1985); or In Re Heatron, Inc., 5 B.R. 703 (Bkrtcy. WD MO 1980) -- all of which shed an entirely different light on the subject.

On January 4, 1988, the Bankruptcy Court ordered the "turnover of funds of the Debtors' estate" from previous attorney Toombs to the appointed trustee. No notification to the Bankruptcy Court of any transfer or, whether the funds have been transferred or, whether a new account has even been opened or, what dollar amount of the funds was, or is to be transferred, has ever been made by previous attorney Toombs or the appointed trustee.

On January 4, 1988, the appointed trustee filed a "preliminary and partial report of trustee;" admitting that he had yet to fully investigate "the acts, conduct, assets, liabilities, and financial

condition of the debtor[s]" as required by 11 U.S.C. 1106(a)(3).

Nor, to date, has he filed a " ... statement of any investigation ..." as required by 11 U.S.C. 1106(a)(4)(A).

On January 14, 1988, notice of appeal was filed by the Kearings on all of the final orders of the Bankruptcy Court entered on January 4, 1988.

On January 14, 1988, an "emergency application for a temporary restraining order against the trustee and motion for stay of order of the Bankruptcy Judge pending appeal" was filed by the Kearings in the Bankruptcy Court pursuant, among other statutes and rules, to F.R. Civ.P. 8005.

On January 19, 1988, the appointed trustee filed a praecipe that instructed the Clerk of the Bankruptcy Court to back-date an attached bond to have an effective

date of December 15, 1987.

On January 21, 1988, previous attorney Toombs filed a "petition for immediate disposition of application for supplemental award of compensation and reimbursement of expenses" wherein he perjured himself by stating, among other things, that the Kearings had made no "particularized or specific objection thereto," which they had and have in their motion of November 6, 1987, a copy of which was given to previous attorney Toombs during the November 6, 1987, hearing and portions of which he had removed pursuant to his protective order of December 3, 1987.

Previous attorney Toombs also perjured himself by stating that "[n]o evidence was presented ... in opposition thereto...," which there was and is in the same motion.

Again, in flagrant and direct violation of Bankruptcy Rule 9003 and Local Rule

106(b), previous attorney Toombs wrote an ex parte letter to the Bankruptcy Judge "request[ing] ... [that] no later than Friday, January 22, 1988, ... this petition and ... proposed order will be acted upon prior to the expiration of your term."

On January 22, 1988, the very next day, the Bankruptcy Court ordered the payment to previous attorney Toombs of $15,221.23, reducing his compensation from the requested amount of $19,228.48, "based in light of counsel's level of experience in Chapter 11."

On January 25, 1988, the Kearings filed in the District Court an ex parte "emergency motion for a stay of all judgments, orders, decrees, and for other relief pending appeal."

On January 26, 1988, the District Court [Harris, J., as motions judge] stayed its ruling on the merits of the emergency

motion and remanded the case for consideration by the Bankruptcy Court of the Kearings' motion for a temporary restraining order, and further ordered that the District Court would hold its motion for an emergency stay "in abeyance" until the Bankruptcy Court had adequate opportunity to consider the motion and to have a hearing, if necessary.

On January 29, 1988, the Bankruptcy Court, without a hearing, denied the emergency application and motion filed on December 23, 1987, as being "legally frivolous and designed solely to harm the Trustee and to cause delay;" and stated in addition with respect to the points raised in various numbered paragraphs of the Kearings' application and motion:

> 11 U.S.C. Section 1104 (c) does not require the US [sic] Trustee to consult with all parties in interest when appointing a trustee, and it would be an obvious impossibility for him to do so in cases where there are a large number of

creditors; and

Section 322(a) does not require a trustee to file an acceptance of appointment. It is this Court's understanding that Mr. Guinee is covered by a blanket bond.

The Bankruptcy Court undoubtedly has neither carefully read the statutes nor the document filed by the Kearings on December 23, 1987 for the answers by the Bankruptcy Court are just not true.

On January 29, 1988, previous attorney Toombs wrote to the managing partner of the law firm where the Kearings' nephew-in-law, attorney Huffstetler, is employed denying accusations, among other things, of perjury in previous pleadings; complaining of a typographical error ("lack of experience" rather than "level of experience") in motion papers; threatening the law firm by stating that if the accusations had been "uttered in a non-privileged forum, they would be

actionable;" and stating that "I have consulted with counsel ... and that your firm will be responsible for the conduct of your associate."

On February 8, 1988, the term expired for the initial Bankruptcy Judge (Bason) in these proceedings; a new Judge (Teel) was sworn in. The new Bankruptcy Judge had no previous experience in bankruptcy law in private practice and only limited experience through his on-the-job training while representing the Justice Department.

On February 8, 1988, a "motion to compel cooperation by debtors" was filed in the Bankruptcy Court by the appointed trustee.

No notice on such motion has ever occurred.

On February 12, 1988, the Kearings formally requested the nephew-in-law to withdraw as attorney of record to prevent problems for attorney Huffstetler with the

members of his law firm regarding the hate letter from the Kearing's previous attorney.

The Kearings have since remained pro se.

On February 17, 1988, counsel for Standard Federal Savings Bank filed a praecipe with the Clerk of the Bankruptcy Court certifying that the enclosed twenty-day notice and attachments had really been sent on December 4, 1987, pursuant to instructions of the Bankruptcy Court on November 6, 1987.

Such counsel also stated that "[t]he original was mailed to the Clerk on December 7, 1987, but did not reach the file."

The attached "notice of settlement" contained not only the wrong hearing date, but stated that "the Debtors and Standard Federal requested that the Court approve the terms of a settlement." The record of

November 6, 1987, states otherwise.

Each of the two matrices used for this noticing was dated differently and was from an entirely unrelated filing.

On February 23, 1988, an "application for authority to employ counsel for the trustee under a general retainer" was filed in the Bankruptcy Court by the appointed trustee.

On February 26, 1988, an "objection to trustee's request to employ counsel" was filed by the Kearings.

On March 21, 1988, the Kearings attempted to review their file at the office of the Clerk of the Bankruptcy Court. The Kearings were informed that the file was in use by another party; and upon inquiry, the party acknowledged affiliation with a law firm that had been retained by the appointed trustee.

Two days later, on March 23, 1988, the

Kearings received notice of a hearing of "application for authority to employ counsel for the trustee and objection thereto; and consent order granting relief from stay and authorizing debtors to execute [a] deed in lieu of foreclosure ... and objection thereto."

On April 7, 1988, at a hearing, the Kearings questioned, then vigorously objected to, an attorney's appearance for the appointed trustee before the hearing on the motion for such counsel pending before the Bankruptcy Court, but were instructed that no questions to the Bankruptcy Court about the matter would be allowed at such hearing.

The Bankruptcy Court immediately entered an order approving the "application for authority to employ counsel for trustee" over the Kearings' protestations that they could not even afford to hire, much less

pay for counsel for themselves and that it was a squandering of assets of the estate for the appointed trustee to retain one, especially since the actual retention occurred on or before March 21, 1988, before any hearing - in fact even before noticing - on the motion had occurred.

The Kearings sought continuance of the hearing until pro bono counsel could review their case and make appearance; and to restrict any action of the appointed trustee until the appeal in the District Court had been heard.

The Bankruptcy Court revoked, sua sponte, an order of the previous Bankruptcy Judge concerning collection of rents by the Kearings on their condominium units and threatened jail to the Kearings if the new order was not obeyed.

At the hearing, the Bankruptcy Court also granted the settlement order for "deed

in lieu" to Standard Federal Savings Bank (with errors still intact from their filing of "notice" on February 17, 1988).

And, finally, at such hearing and without any notice whatsoever, the Bankruptcy Court, on its own motion, entertained and allowed an unscheduled hearing on the appointed trustee's "motion to compel cooperation by debtors" and granted the motion over further protestations of the Kearings, wherein the Bankruptcy Court stated that the appointed trustee was now, for all practical purposes, the owner of the Van Ness Street property and the Kearings would physically be removed from their home if they did not cooperate with the trustee.

On April 8, 1988, counsel for Standard Federal Savings Bank, via messenger, sent a hurriedly revised and corrected copy of a settlement order from April 7, 1988, for

the Bankruptcy Judge's immediate signature.

On April 14, 1988, the Kearings filed a motion in the Bankruptcy Court for a "stay of all judgments, orders, decrees and for other relief pending appeal."

The Bankruptcy Court never responded.

On April 21, 1988, the Kearings filed an "emergency application for a temporary restraining order and motion for a stay of order pending appeal" in the Bankruptcy Court.

On April 21, 1988, the Kearings filed "notice of appeal" to the District Court:

> ... from the final order for authority to employ counsel for the trustee under general retainer' entered on April 11, 1988, and for any other orders forthcoming at hearing on April 7, 1988, of the Bankruptcy Court entered in this bankruptcy proceeding.

The "other orders forthcoming at hearing on April 7, 1988," are, to date:

> Order "approving agreement in settlement of motions seeking relief from stay, compromising mutual claims and authorizing trustee to execute deeds in

lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C." entered on April 23, 1988.

Order "approving agreement in settlement of motions seeking relief from stay, compromising mutual claims and authorizing trustee to execute deeds in lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C." entered on April 23, 1988.

Order "to compel cooperation by debtors," entered on April 25, 1988.

On April 25, 1988, the Bankruptcy Court denied the Kearings' emergency application for a restraining order and motion for a stay of April 21, 1988.

On May 19, 1988, a "motion for issuance of show cause order" was served on the Kearings. This motion alleged that the Kearings had not cooperated with the appointed trustee as instructed by the Bankruptcy Court on April 7, 1988, and were therefore in contempt of the Bankruptcy Court's order of April 25, 1988.

On May 20, 1988, the appointed trustee

filed with the District Court a motion to dismiss the appeal of April 21, 1988. On June 1, 1988, a "notice by trustee of correction of facts set forth in previously filed motion to dismiss appeal" was filed in the District Court stating that Standard Federal Savings Bank had changed the agreed upon "deed in lieu" transfer and now wished to transfer the "Hastings" property to a third party.

On June 9, 1989, the District Court ordered (Jackson, J.) the Kearings to file opposition to trustee's motion to dismiss within 11 days of date of this order, failing which their appeal would be treated as conceded and suspending brief pending outcome of trustee's motion.

On June 24, 1988, the Kearings filed for an "emergency application for a writ of mandamus" in the District Court to obtain certain records under Rule 2013(b) and (c)

of the Rules of Bankruptcy Procedure which states:

> (b) The clerk shall maintain a public record listing fees paid from estates (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professional persons employed by trustees, and (2) to examiners appointed by the court. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee paid. The record shall be maintained chronologically and shall be kept current and open to examination by the public without charge.
>
> (c) At the close of each annual period, the clerk shall prepare a summary of the public record by individual or firm name, to reflect total fees paid during the preceding year. The summary shall be open to examination by the public without charge.

The Kearings were (and are) in need of this record from January, 1980, until the present date; and even if they were not, the Rule is rather precise.

The Clerk of the United States Bankruptcy Court for the District of Columbia has been unable and unwilling to produce such record even though he is, and

has been, informed that he must maintain such record.

On July 1, 1988, the Kearings filed an "emergency motion for a stay of all judgments, orders, decrees and for other relief pending appeal" in the District Court.

On July 7, 1988, the Kearings filed an answer to the motion to dismiss the appeal of April 21, 1988, submitted by the appointed trustee.

On July 8, 1988, the District Court (Jackson, J.) held hearing and denied the emergency stay of the Kearings, stating that the "deeds in lieu" had already been transferred and there was no need for the emergency stay.

On July 12, 1988, the District Court (Jackson, J.) denied the Kearings' "emergency application for writ of mandamus" for the records that are supposed

to be kept by the Bankruptcy Clerk and stated that there was "no basis" for such writ.

On July 20, 1988, the District Court for the District of Columbia (Jackson, J.) filed a memorandum and order that the Kearings file a motion for leave to appeal in the form prescribed by Bankruptcy Rule 8003(a), failing which the motion to dismiss the appeal would be granted.

The Court stated that the Kearings' issues being appealed are "clearly interlocutory in nature," including those matters the Kearings wish to raise as outlined in their statement of issues; and, all issues and matters will only be entertained by this Court "if leave to appeal is granted" under 28 U.S.C. 158(a); Bankruptcy Rule 8001(b) and 8003.

While the Kearings did not agree that all orders of the Bankruptcy Court

forthcoming at hearing on April 7, 1988, were "clearly interlocutory;" the route taken for appeal, whether "of right" or "by leave," was inconsequential so long as the District Court heard the appeal.

The Kearings then complied with the District Court's order and, in their document, filed the following questions and the relief sought as required by Rule 8003(a); and now, ask this Honorable Court to resolve:

Question: Are the Debtor-Appellants, in fact, legally in bankruptcy proceedings?

Relief Sought: The requirements of Section 322 of Pub.L. 99-353, July 10, 1984, Section 283(aa) of Pub.L. 99-554, October 27, 1986, F.R.Civ.P. 11 and Bankruptcy Rule 9011 should not be disregarded as mere oversight or technical error and appropriate sanctions should be imposed on both the Debtor-Appellants' previous attorney, Alfred Lawrence Toombs, and the Clerk of the United States Bankruptcy Court; and in the alternative, Debtors-Appellants request the Court to dismiss this Chapter 11 proceeding immediately, retroactively dating the order to December 10, 1986.

If this Court finds that the Kearings are not, indeed, legally in bankruptcy proceedings, the following questions and relief sought are moot. If the Court finds that the Kearings are under the jurisdiction of the Bankruptcy Court for the District of Columbia, then the following questions and relief sought are most pertinent.

Question: Has the United States Trustee complied with his duties in this proceeding by failing to appoint a committee of unsecured creditors as required by 11 U.S.C. 1102(a)(1), regardless of whether or not any could or would serve?

Relief Sought: Order an immediate appointment of a committee of unsecured creditors.

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(A), by failing to monitor applications for compensation and reimbursements filed under 11 U.S.C. 330?

Relief Sought: Order an immediate investigation into the fees paid to, and

applications for additional fees by, the Kearings' previous attorney, Alfred Lawrence Toombs.

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(B), by failing to monitor Debtors-Appellants' plan of reorganization and to ascertain why no disclosure statement has been filed?

Relief Sought: Order an immediate investigation into the Debtors-Appellants' plan of reorganization; discern why no disclosure statement has been filed; and why this case has come to a complete stop save the appointed trustee's selling or giving away the assets of the Kearings' estate, all the while incurring enormous capital gains and depreciation (recapture) tax liabilities [Approximately $504,373 .10 to date. Total tax against the estate may exceed $742,000.00 if the Bankruptcy Court allows the Van Ness Street property to be sold according to the dictates of the appointed trustee].

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(F), by failing to notify the appropriate United States Attorney of matters which may constitute a crime under the laws of the United States?

Relief Sought: Order an immediate investigation into the fees allowed or applied for under 11 U.S.C. 326, 328, 329, 330, and Rule 2016 of the Rules of Bankruptcy Procedure; obtain under Rule 2013 of the Rules of Bankruptcy Procedure

the records of this appointed trustee and other trustees serving in this District.

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(G), by failing to monitor the progress of this case?

Relief Sought: Order the United States Trustee to diligently investigate and answer the Kearings' legitimate queries concerning the status of this case without such nebulous answers as, "I hear where you're coming from, Mrs. Kearing;" and to assure that all officers of the Court are adhering to the Code of Professional Conduct as determined by In re Smith, 5 B.R. 92 (Bkrtcy. D. DC 1982).

Question: Did this Court fully understand all the ramifications of the Kearings' petition for the "emergency petition for a writ of mandamus" to acquire from the Clerk of the Bankruptcy Court the records of trustees and their financial dealings with professionals hired by them in this District?

Relief Sought: Issue the writ of mandamus.

Question: Has the Clerk of the Bankruptcy Court for the District of Columbia performed his duties under Rule 9011 and 2013 of the Rules of Bankruptcy Procedure?

Relief Sought: Issue the writ of mandamus as the Kearings petitioned for and order the voluntary petition of the Kearings stricken.

Question: Have the Kearings, as debtors-in- possession, complied with their fiduciary duties in this proceeding?

Relief Sought: Order declaring that a vacancy of the trustee's office has existed since December 20, 1987 (5 days after trustee appointment); removal of the individual currently acting as appointed trustee whether or not his capacity is "de facto" or "de jure"; reinstatement of the Kearings as debtors-in- possession since the Bankruptcy Court sent no notice and held no hearing as required by 11 U.S.C. 1102, received no testimony, entered no evidence, neither analyzed nor weighed any cost/benefits or cost/protection for appointment of a trustee, found "cause" even though there had been no fraud, dishonesty, incompetence or gross mismanagement on the part of the Debtors-Appellants and that the expense and inconvenience of a trustee was, and is, an adverse factor to successful reorganization of the Debtors-Appellants.

Question: Why was an examiner not appointed in this proceeding as requested under 11 U.S.C. 1104(b)(1) by the Kearings' application for an expedited hearing for appointment of an examiner?

Relief Sought: Order notice and hearing on the Kearings' expedited application for appointment of an examiner pursuant to 11 U.S.C. 1104(b)(1).

Question: Was the appointment of a trustee in this proceeding inappropriate?
Relief Sought: Order notice and hearing on the Kearings' application for an expedited hearing for appointment of an

examiner [above]; and in the alternative, order notice and hearing on motion for appointment of trustee as mandated by 11 U.S.C. 1102.

The following questions are from the order of April 23, 1988, of the Bankruptcy Court "approving agreement in settlement of motions seeking relief from stay, compromising mutual claims and authorizing trustee to execute deeds in lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C."

The relief sought is to find that this order is null and void.

Question: Is this order "interlocutory" or "final" under 28 U.S.C. 158(a)?

Question: Were the findings of fact by the Bankruptcy Court clearly erroneous under Rule 8013 of the Rules of Bankruptcy Procedure?

Question: Did Standard Federal, in seeking relief from the stay, meet the two-prong burden of proof test under 11 U.S.C. 362(d)(2) and (g)(1) since the Kearings have equity in the collateral and the collateral is necessary for an effective

reorganization?

Question: Did Standard Federal have adequate protection; and in the alternative, should relief been granted from the stay due to:

(1) continuation of stay resulting in undue risk of material harm;

(2) no reasonable possibility of reorganization;

(3) property not needed for reorganization;

(4) no equity in the property for benefit of debtor or creditors?

Question: Did Standard Federal have any problem resulting from Article 9 of the Uniform Commercial Code in that Standard Federal had no claim which could be lost in cash proceeds being commingled -- assuming that Standard Federal under Article 9-306 had a perfected security interest in any proceeds of the Kearings to begin with?

Question: Was this issue a "core" proceeding or a proceeding "related to" this Title 11 case?

Question: Will this transfer of property in the Bankruptcy Court pass muster when tested against the criteria set forth in the United States Supreme Court decision in the Northern Pipeline case, which provides that when controversy arises out of state law, it may only be adjudicated, with the federal system, by an Article III court; and Article I judges have no subject matter jurisdiction in this proceeding?

Question: Should the Bankruptcy Judge, under 28 U.S.C. §157(b)(3), have

determined, on the judge's own motion or on timely motion of a party, whether this proceeding was a "core" proceeding under 28 U.S.C. 157; or is a "related" proceeding and was heard as a "non-core," related proceeding, wherein proposed findings of fact and conclusions of law should have been submitted to the district court pursuant to 28 U.S.C. 157(c)(1)?

Question: Should either 28 U.S.C. 1334(c)(2) [mandatory abstention] or 28 U.S.C. 1334(c)(1) [voluntary abstention] have been invoked in this proceeding?

Question: Does an appointed, but unqualified trustee, whether "de facto" or not, have the unmitigated right to transfer property under 11 U.S.C. 363 in this proceeding?

Question: Is Standard Federal protected by 11 U.S.C. 363(m) in that reversal or modification of an appeal of the sale or lease of property authorized under the Bankruptcy Code does not affect the validity of a sale under such authorization to an entity that purchased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization was stayed pending appeal even though the 9th Circuit Court of Appeals has "carved out a narrow exception to this rule, where real property is sold to a creditor who is a party to the appeal" and where "it would not be impossible for the Court to fashion some sort of relief"? See In re Sun Valley Ranches, Inc., 823 F.2d 1373 (9th Cir. 1987) at page 1375, since Standard Federal found use of this cite to defend the "mootness" issue of this transfer but

failed to continue to the very next paragraph below their quote which then proceeds to state the "exception" ruling which noted "a narrow exception to this rule, where real property is sold to a creditor who is a party to the appeal" and where "it would not be impossible for the Court to fashion some sort of relief"?

Dated: January 29, 1990

/s/ Leon R. Kearing
LEON R. KEARING, Pro Se

/s/ Shirley M. Kearing
SHIRLEY M. KEARING, Pro Se